

**FILED**

DISTRICT COURT OF GUAM

AUG 25 2006 *mb*

DISTRICT COURT OF GUAM  
TERRITORY OF GUAM

MARY L.M. MORAN  
CLERK OF COURT

Counsel appearing on following page

JULIE BABAUTA SANTOS, *et al.*,

Petitioners,

v.

FELIX P. CAMACHO, *et al.*,

Respondents.

Civil Case No. 04-00006

CHARMAINE R. TORRES, *et al.*,

Plaintiffs,

v.

GOVERNMENT OF GUAM, *et al.*,

Defendants.

Civil Case No. 04-00038

MARY GRACE SIMPAO, *et al.*,

Plaintiffs,

v.

GOVERNMENT OF GUAM,

Defendant,

v.

FELIX P. CAMACHO, Governor of Guam

Intervenor-Defendant.

Civil Case No. 04-00049

**DECLARATION OF CURTIS C.  
VAN DE VELD IN SUPPORT OF  
SIMPAO PLAINTIFFS'  
OPPOSITION TO PETITIONER  
SANTOS' AMENDED MOTION  
FOR APPOINTMENT OF LEAD  
COUNSEL**

DECLARATION OF CURTIS C.  
VAN DE VELD IN SUPPORT OF  
OPPOSITION

VAN DE VELD SHIMIZU CANTO & FISHER  
East Marine Corps Drive  
Hagatna, Guam 96910  
Tel. 671.472.1131  
Fax 671.472.2886

TOUSLEY BRAIN STEPHENS PLLC  
1700 Seventh Avenue, Suite 2200  
Seattle, Washington 98101-1332  
Tel. 206.682.5600  
Fax 206.682.2992

ORIGINAL

VAN DE VELD SHIMIZU CANTO & FISHER  
Suite 101 Dela Corte Bldg.  
167 East Marine Corps Drive  
Hagåtña, Guam 96910  
671.472.1131

TOUSLEY BRAIN STEPHENS PLLC  
Kim D. Stephens, P.S., WSBA #11984  
Nancy A. Pacharzina, WSBA #25946  
1700 Seventh Avenue, Suite 2200  
Seattle, Washington 98101  
206.682.5600

~~~~~  
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VAN DE VELD SHIMIZU CANTO & FISHER  
East Marine Corps Drive  
Hagatna, Guam 96910  
Tel. 671.472.1131  
Fax 671.472.2886

TOUSLEY BRAIN STEPHENS PLLC  
1700 Seventh Avenue, Suite 2200  
Seattle, Washington 98101-1332  
Tel. 206.682.5600  
Fax 206.682.2992

1                                   **DECLARATION OF CURTIS C. VAN DE VELD**

2

3           I, Curtis C. Van de veld, Esq., hereby declare and state the following under penalty of

4 perjury:

5           1.       I am an attorney for the Plaintiffs in the matter of Plaintiffs Mary Grace Simpao,

6 et al., vs. Defendant Government of Guam and Intervenor-Defendant Felix P. Camacho, District

7 Court of Guam Civil Case No. CIV04-00049;

8           2.       The matters stated herein are based upon my personal knowledge or belief and as

9 to those matters I swear that the extent of my knowledge is truthfully stated and as to those

10 matters based on my belief, I believe those matters to be true. I further believe that, if I was

11 called to give testimony upon the matters stated herein, I am competent to testify to those

12 matters, the authentication of certain records having been established before my testimony;

13           3.       I have read and reviewed the matters set forth in the *AMENDED DECALRATION*

14 *OF INTERIM CLASS COUNSEL MICHAEL F. PHILLIPS IN SUPPORT OF AMENDED*

15 *MOTION FOR APPOINTMENT OF LEAD CLASS COUNSEL (AMENDING DOCKET NO.*

16 *276)* (hereinafter "*Phillips Amend. Decl.*"); CV04-00006, Docket No. 349;

17           4.       At ¶ 12 of *Phillips Amend. Decl.*, Mr. Phillips lists several cases that he holds out

18 as examples of his experience and prowess which he believes qualify him as the EITC class lead

19 counsel. I have reviewed the Superior Court of Guam court Dockets of nearly all these cases to

20 reveal that Phillips' reliance on any record of past accomplishment in these cases is embellished

21 and altogether unfounded. As shown below, many of the following cases cited by Phillips have

22 languished without action for several years, and some have resulted in dismissals of Phillips'

23 claims:

24 ~~~~~

25 DECLARATION OF CURTIS C.  
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East Marine Corps Drive  
Hagatna, Guam 96910  
Tel. 671.472.1131  
Fax 671.472.2886

TOUSLEY BRAIN STEPHENS PLLC  
1700 Seventh Avenue, Suite 2200  
Seattle, Washington 98101-1332  
Tel. 206.682.5600  
Fax 206.682.2992

1 (a) Mr. Phillips informs this court that he filed a suit titled "*Vicente C.*  
2 *Pangelinan, Senator, Individually and on behalf of the People of Guam v. Carl T.C. Gutierrez, et*  
3 *al., SP0086-00.* However, Mr. Phillips neglects the fact that no law or rule authorizes him to act  
4 in that matter for "the People of Guam." More importantly, shortly after this political suit was  
5 commenced, the matter was dismissed with prejudice on April 20, 2000.

6 (b) Another case referenced by Mr. Phillips is the matter of *Angel Santos and the*  
7 *Chamorro Nation v. Joseph F. Ada.* I reviewed this Docket that I received from the office of the  
8 Clerk of Court, Superior Court of Guam, and it demonstrates that the matter was filed March 25,  
9 1992, had some activity in late 1994 and early 1995 but has been dormant of any activity since  
10 then. No Judgment has issued in that case, despite the assertion by Mr. Phillips that the case  
11 produced a "landmark decision mandating grant of tens of thousands of acres ..."

12 (c) Mr. Phillips cites another matter of *Celestine C. Babauta, individually and on*  
13 *behalf of all persons similarly situated ... vs. Government of Guam, SP0339-96.* I reviewed this  
14 Docket that I received from the office of the Clerk of Court, Superior Court of Guam, and it  
15 shows Mr. Phillips filed that action on December 31, 1996, some activity occurred through to  
16 December 2002, however, since that time the case has had no activity. No Judgment has issued  
17 in that case.

18 (d) In another matter cited, the case of *Vicente C. Pangelinan, Senator and*  
19 *Joseph C. Wesley, Mayor, et al vs. Carl T.C. Gutierrez, et al, Special Proceedings Case No.*  
20 *SP0073-98,* that matter was combined with SP0114-95, Civil Cases CV1383-95 and CV1856-95.  
21 According my review of the court's files in those matters and Docket of those cases, the cases  
22 have not had any court activity since February 4, 1998 and no judgment has issued in those  
23 matters.

1 (e) Another case touted by Mr. Phillips is the case of *Pacita Aguon v. Carl T.C.*  
2 *Gutierrez, et al.*, SP20797. Mr. Phillips refers to that matter as “Class action prosecuted  
3 attempting to secure statutory supplement for retirees.” I have reviewed this Docket from that  
4 matter and it indicates that case was filed on July 18, 1997, that the court issued a Decision And  
5 Order granting the Respondents’ motion for summary judgment, a Judgment for Respondents  
6 rendering all other motions moot was filed on March 21, 2001, and at no time were issues of a  
7 class action addressed.

8 (f) In another example, Mr. Phillips filed several cases, SP0114-95, CV1383-95,  
9 CV1856-95 and SP0024-96, all of which were designed to challenge the constitutionality of the  
10 drawing of school districts based on the precept of ‘one man – one vote.’ The cases were  
11 eventually consolidated for hearing and the court found that the manner of the districting violated  
12 law. Despite orders from the court for Respondents to submit redistricting plans, none were filed.  
13 Thereafter, then Judge Gatewood became Associate Justice Gatewood and the cases have been  
14 inactive since 1998. No judgment has been entered in those cases.

15 (g) Another case Mr. Phillips holds out as part of his record (See *Phillips Amend.*  
16 *Decl.* at ¶ 7) is *Western Systems, Inc. et al. vs. Atkins Kroll, Inc., et al. Civil Case No. CV1314-*  
17 *01*. Mr. Phillips claims that the case was a discovery intensive case involving multi-million  
18 dollars claims. I have reviewed the Docket of that matter which discloses that the Complaint was  
19 filed August 1, 2001, and on October 30, 2003 was dismissed with prejudice by stipulation (each  
20 party bearing their own costs) while many depositions and discovery motions were pending.

21 (i) In another case offered by Phillips, *Ignacio J. Pangelinan et al. vs. Carl T.C.*  
22 *Gutierrez, et al.*, SP0098-00, the matter was dismissed under a Judgment entered on April 9,  
23

1 2001, holding that plaintiff not recover from his complaint and that the issues raised had become  
2 moot.

3 (j) Finally, Mr. Phillips has cited his involvement in *Rios v. Ada et al.*, SP0206-  
4 93, the only cognizable class action that Mr. Phillips has been counsel for, though Mr. Phillips  
5 appears to be the only plaintiffs' counsel in the action. In a case which has been slowly litigated  
6 since 1993, Mr. Phillips seeks to recover a judgment for unpaid cost of living adjustments to  
7 retirees from the government of Guam, in an amount seeking over a hundred million dollars.  
8 Mr. Phillips let this class action languish for over 10 years now without the class receiving any  
9 monetary relief from the government defendant, even failing to do as little as change his  
10 individually named defendant Governors when they left office. Recently, Mr. Phillips has  
11 seemingly resurrected this case from inactivity and is pursuing over a hundred million dollars  
12 from the same government in the EITC suit, which in both cases has claimed that either  
13 judgment rendered against the government would have catastrophic effects because the  
14 government lacks the ability to pay either, a fact invariably conflicting with and impacting upon  
15 Mr. Phillips' resolve in his settlement negotiations over the amount of EITC refunds.

16  
17 5. I declare and attest that "Exhibit A" attached to this Declaration are true and  
18 correct copies of KUAM Television Station News Reports downloaded from the KUAM internet  
19 website (www. KUAM.com) of three separate news stories entitled: "Lieutenant Governor still  
20 negotiating legal representation" dated June 18, 2004; "Lieutenant Governor's Office still  
21 working out detail with single legal services bidder" dated June 22, 2004; and "Lieutenant  
22 Governor reportedly in final stages of negotiations with legal counsel" dated July 2, 1994;

23  
24  
25 ~~~~~  
DECLARATION OF CURTIS C.  
VAN DE VELD IN SUPPORT OF  
OPPOSITION

VAN DE VELD SHIMIZU CANTO & FISHER  
East Marine Corps Drive  
Hagatna, Guam 96910  
Tel. 671.472.1131  
Fax 671.472.2886

TOUSLEY BRAIN STEPHENS PLLC  
1700 Seventh Avenue, Suite 2200  
Seattle, Washington 98101-1332  
Tel. 206.682.5600  
Fax 206.682.2992

1           6.       I declare and attest that "Exhibit B" attached to this Declaration is a true and  
2 correct copy of a KUAM Television Station News Report downloaded from the KUAM internet  
3 website (www. KUAM.com) of a news story entitled "Acting Governor, Attorney General  
4 announce EITC will be paid over six years" dated June 13, 2004;

5           7.       I declare and attest that "Exhibit C" attached to this Declaration is a true and  
6 correct copy of page 21 of the "Settlement Agreement" which is attached as Exhibit A to the  
7 *Order Granting Preliminary Approval of Class Action Settlement* entered June 17, 2004, in  
8 District Court of Guam Civil Case No. CV04-00006, *Santos v. Camacho* at Docket No. 14;

9           8.       I declare and attest that "Exhibit D" attached to this Declaration is a true and  
10 correct copy of page 25 of the edition of the Pacific Sunday News newspaper published June 27,  
11 2004 and entitled "Notice Of Class Action And Proposed Settlement";

12           9.       I declare and attest that "Exhibit E" attached to this Declaration is a true and  
13 correct copy of correspondence between the Office of the Governor and the Attorney General's  
14 Office, dated September 16, 2004, referring to the Administrative Plan as "a new settlement  
15 under the guise of an administrative plan.";

16           10.      I declare and attest that "Exhibit F" attached to this Declaration is a true and  
17 correct copy of the *Complaint* filed in Simpao v. Govt. of Guam, District Court of Guam Civil  
18 Case No. CV04-00049, Docket No. 1;

19           11.      I declare and attest that "Exhibit G" attached to this Declaration is a true and  
20 correct copy of the *Order* [denying motion to dismiss], issued by Judge Ronald Lew on March  
21 15, 2005 in District Court of Guam Civil Case, Simpao v Govt. of Guam, No. CV04-00049,  
22 Docket No. 53;

23  
24  
25 ~~~~~  
DECLARATION OF CURTIS C.  
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VAN DE VELD SHIMIZU CANTO & FISHER  
East Marine Corps Drive  
Hagatna, Guam 96910  
Tel. 671.472.1131  
Fax 671.472.2886

TOUSLEY BRAIN STEPHENS PLLC  
1700 Seventh Avenue, Suite 2200  
Seattle, Washington 98101-1332  
Tel. 206.682.5600  
Fax 206.682.2992

12. I declare and attest that "Exhibit H" attached to this Declaration is a true and correct copy of the *Order* [granting partial summary judgment], issued by Judge Ricardo Martinez on June 15, 2005 in District Court of Guam Civil Case Simpao v. Govt. of Guam, No. CV04-00049, Docket No. 99;

13. I declare and attest that "Exhibit I" attached to this Declaration is a true and correct copy of *Plaintiffs' Motion For Class Certification*, filed on July 5, 2005 in District Court of Guam in Civil Case No. 04-00049.

FURTHER DELCARANT SAYETH NAUGHT this Friday, August 25, 2006 at  
Hagåtña, Guam, swearing and affirming the foregoing is true.

By:

~~Curtis C. Van de veld~~



# EXHIBIT A

[Print this story](#)

## Lieutenant Governor still negotiating legal representation

by Ken Wetmore, KUAM News  
Friday, June 18, 2004

---

The Office of the Lieutenant Governor is still in negotiations for the services of an attorney. The Lieutenant Governor's Office only received one bidder on their request for proposal for legal services in May. While the Lieutenant Governor's Office hasn't revealed whom the proposal came from, saying procurement law bars them from answering that question, Attorney Mike Phillips says his law firm submitted the bid.

Phillips says while his firm has not dropped its proposal negotiations are not actively ongoing. According to news files the Lieutenant Governor's Office is contending since both the Superior and Supreme courts have found the Office of the Lieutenant Governor to be an individual entity outside of the Governor's Office, the Lieutenant Governor should have his own attorney to represent and give legal advice to his office.

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## **Lieutenant Governor's Office still working out detail with single legal services bidder**

**by Ken Wetmore, KUAM News**  
**Tuesday, June 22, 2004**

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The Office of the Lieutenant Governor still has to finalize negotiations with the single bidder on a request for proposal for an attorney to represent the office. Lieutenant Governor's spokesperson Phil Roberto would only say on the matter that negotiations are ongoing.

While the Lieutenant Governor's Office would not reveal who the single bidder is, KUAM News has confirmed with Attorney Mike Phillips that his law firm was the lone bidder. The original deadline to turn in proposals was May 7, but the request for proposal had to be extended to May 19, when there were no takers for the original RFP.

The Lieutenant Governor's Office is contending since both the Superior and Supreme courts have found the Office of the Lieutenant Governor to be an individual entity outside of the Lieutenant Governor, he should have his own attorney to represent and give legal advice to his office.

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## **Lieutenant Governor reportedly in final stages of negotiations with legal counsel**

**by Ken Wetmore, KUAM News**  
**Friday, July 02, 2004**

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Guam's Lieutenant Governor is in the final stages of negotiations with a law firm to represent his office. Lieutenant Governor Kaleo Moylan's spokesperson Phil Roberto today told KUAM News the Lieutenant Governor's Office was very close to closing a deal with the single bidder on the Lieutenant Governor's request for proposal for legal services.

According to news files the Lieutenant Governor's Office is contending since both the Superior and Supreme courts have found the Office of the Lieutenant Governor to be an individual entity outside of the Governor's Office, the Lieutenant Governor should have his own attorney to represent and give legal advice to his office. While Roberto has declined to name the law firm who bid on the request for proposal, Attorney Mike Phillips earlier confirmed that his law firm in the lone bidder.

Phillips represented Lieutenant Governor Moylan in Governor Felix Camacho's request for a declaratory motion before the Supreme Court and interestingly is also the chair of the Guam Democrat Party.

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# EXHIBIT B



## **Acting Governor, Attorney General announce EITC will be paid over six years**

**by Zita Taitano, KUAM News**  
**Sunday, June 13, 2004**

---

A settlement agreement was reached on the Earned Income Tax Credit for eligible taxpayers, as well as for the payment of overtime payments for public safety officers. The announcement was made during a joint press conference between Acting Governor Kaleo Moylan and Attorney General Douglas Moylan at the Office of the Governor at Adelup.

Saying it has always been the Administration's intent to pay the EITC, Acting Governor Moylan announced a settlement in a class action lawsuit to force the Government of Guam to pay out an estimated \$120-160 million in tax credits over six years. The acting governor was flanked by the Attorney General, who represented the government in the case, and Attorney Mike Phillips, who was the legal counsel representing the plaintiffs in the class action suit.

The two sides announced they had agreed on terms that called for \$60 million in owed EITCs to be paid out over eight years. GovGuam is required to immediately post \$3 million to an account for payouts of the tax credit and must put an additional \$17 million in over the next year. For the next eight years, \$5 million would be set aside. The settlement also calls for the government to pay out the Earned Income Tax Credit in full in from this point on.

The \$60 million settlement represents only about half of what is owed to eligible taxpayers. AG Moylan called the settlement "great for the Government of Guam as it means the government will only have to come up with half of what a court might have ordered by paid." At the same time, opposing attorney Phillips said the settlement was good for his clients because it allowed them to finally get at least a portion of the money owed to them.

As for where the public sector is going to come up with \$60 million, Department of Revenue and Taxation director Art Ilagan said it is likely that payout of income tax refunds, as well as vendor payments may be slowed down as the government tries to find the cash to come up with the \$3 million immediately and the additional \$17 million over the next year. In future years the revenue projections will be adjusted to reflect the EITC payments.

According to Attorney Phillips, he was approached by the Attorney General on Thursday about the terms of this settlement and the along with the acting governor and Administration cabinet members worked out the details over the last several days. AG Moylan said today the settlement was not forced by the payment of a single EITC in March of this year. Moylan said the payment did not force the government into the settlement and said it has always been his desire to see the case settled.

It was also announced at this afternoon's press conference that a settlement had been reached between the Camacho Administration and the Guam Attorney General regarding the payment overtime to the Department of Corrections, the Guam Fire Department and the Guam Police Department. Acting Governor Moylan says that with an increase in business license renewals this year the Administration has been able to find the \$2.7 million necessary to pay the past due overtime.

It was noted that this is the first time in years that the government does not owe overtime to the agencies.

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**Print this story**

# EXHIBIT C



D. Notice. Any notice, request, instruction or other document to be given by the Government of Guam to Petitioner, or vice versa, shall be in writing and (a) delivered personally or by Certified Mail, Return Receipt Requested, to counsel for the parties as follows:

If to the Government of Guam:

Honorable Douglas B. Moylan  
Attorney General of Guam  
Office of the Attorney General  
Guam Judicial Center  
120 West O'Brien Drive, Suite 2-200E  
Hagatna, Guam 96910

If to the Petitioner:

Michael F. Phillips, Esq.  
Phillips & Bordallo, P.C.  
410 West O'Brien Drive, Suite 102  
Hagatna, Guam 96910

E. Attorneys' Fees. The Petitioner and the Government of Guam agree that Counsel for the EIC Class shall recover attorneys' fees ~~and court costs in the amount of~~ *in an amount to be determined by the court.* *6/17/04* *6/15/04* *6/17/04*

*by the court.* ~~ten percent (10%) of the Settlement Amount.~~ The recovery of attorneys' fees and court costs shall be from, and not in addition to, the Settlement Amount, and shall be executed in such manner as provided in the Administration Plan, not inconsistent with this Settlement Agreement. The Settlement Amount is attributed to the efforts of Petitioner and Counsel for the EIC Class. Although the value of the benefit conferred by Petitioner and Counsel for the EIC Class to each member of the EIC Class cannot be determined with complete accuracy until all claims are presented, attorneys' fees awarded against the Settlement will shift the costs of litigation to each member of the EIC Class in the exact proportion that the value of each individual's claim bears to the total recovery.

# EXHIBIT D

UNITED STATES DISTRICT COURT  
OF GUAM

CIVIL NO. CIV04-00006

JULIE BABAUTA SANTOS, individually, and on  
behalf of all those similarly situated,

Petitioner.

vs.

FELIX A. CAMACHO, Governor of Guam, ART  
ILAGAN, Director of Department of Revenue and  
Taxation, LOURDES M. PEREZ, Director of  
Department of Administration; and GOVERNMENT  
OF GUAM,

Respondents.

**NOTICE OF CLASS ACTION AND  
PROPOSED SETTLEMENT**

To: All individuals who filed Guam income tax  
returns and qualified for earned income tax credits  
for any or all of tax years 1996, 1998, 1999, 2000,  
2001, 2002 or 2003.

**Summary of the Lawsuit.** This lawsuit sought payment  
of refundable earned income tax credits for tax years  
1996, 1998, 1999, 2000, 2001, 2002, and 2003 (the  
"applicable tax period"). This lawsuit has been certified  
by the Court as a class action. The counsel for the  
petitioner and the class is Michael F. Phillips of Phillips  
& Bordallo, P.C. The counsel for the respondents is  
Douglass B. Moylan, Attorney General of Guam.

**Definition of the Class.** You are a member of the class if  
you (a) filed Guam income tax returns and (b) were and  
are entitled to be paid refundable earned income tax  
credits under the Guam Territorial Income Tax and the  
Earned Income Program for any or all of the following  
tax years: 1996, 1998, 1999, 2000, 2001, 2002 and 2003.

**Proposed Settlement.** The petitioner and the  
Government of Guam reached a Settlement of this  
lawsuit. The Court preliminarily approved the  
Settlement. The Settlement will provide payments,  
before Court-ordered deductions, to you of  
approximately fifty percent (50%) or more of the  
estimated refundable earned income tax credits you may  
have claimed for the applicable tax period. The  
Settlement Amount is \$60 Million Dollars. The  
Settlement Amount will be deposited into an EIC  
Settlement Fund as follows: At least \$3 Million Dollars  
by July 17, 2004; at least \$17 Million Dollars over eleven  
months following the first installment; and at least Five  
Million Dollars on or before June 30th of each  
subsequent year, beginning on June 30, 2006 and ending  
June 30, 2013. The Settlement also provides that the  
Government of Guam will fully implement the earned  
income tax program for tax years 2004 and beyond. The  
Court awarded attorneys' fees and court costs to  
petitioner and Class Counsel in the amount of ten percent  
(10%) of the Settlement Amount. This Settlement will  
release the Government of Guam from all further liability  
for refundable earned income tax credits to Class  
Members for the applicable tax period.

**Procedures Concerning the Settlement.** On  
September 9, 2004, at 10:00 a.m., the Court will hold a  
hearing at the District Court of Guam before Magistrate  
Judge Joaquin V.E. Manibusan, Jr. to determine whether  
the Settlement is fair and reasonable and should be given  
Final Approval.

**Objections to the Settlement and Requests for  
Exclusion.** If you believe the Court should not approve  
the Settlement, you may deliver or mail to the Court  
written objections to the Settlement no later than August  
9, 2004, together with evidence of qualification for  
earned income tax credits for any tax year within the  
applicable tax period. You may also appear at the  
hearing on Final Approval, provided, however, that no  
Class member shall be heard unless he or she complies  
with the requirements to file written objections. If you  
do NOT want to participate in the Settlement Amount of  
\$60 Million Dollars, or if you want to pursue separate  
claims, you may request exclusion from the class by  
delivering to the Court a written request to opt out of the  
class by August 9, 2004. All objections and requests for  
exclusion shall be personally signed by the Class member  
and delivered to EIC Settlement, c/o Clerk of Court, 4th  
Floor, U.S. Courthouse, 520 West Soledad Avenue,  
Hagatna, Guam 96910.

**Participation in Settlement.** If you want to participate  
in the Settlement Amount of \$60 Million Dollars, you do  
not have to take any action at this time. If the Settlement  
becomes final, you will be mailed a notice informing you  
of the information that must be provided to the  
Department of Revenue and Taxation and all other  
procedures necessary to obtain your portion of the  
Settlement Amount. Those who do NOT request  
exclusion will be bound by the judgment in this Class  
Action and by the Settlement if it becomes final. Any  
person who provides false information in an attempt to  
obtain a portion of the settlement will be prosecuted to  
the fullest extent of the law.

**Further Information.** For further details of this  
Settlement, you may request further information from the  
Department of Revenue and Taxation at Bldg. 13-1,  
Mariner Avenue, Tiyan, Guam, 96913, or visit the  
Attorney General of Guam's website at  
[www.guamattorneygeneral.com](http://www.guamattorneygeneral.com).

PLEASE FOLLOW THE PROCEDURES SET OUT  
ABOVE. DO NOT CONTACT THE COURT FOR  
QUESTIONS ABOUT THE SETTLEMENT.

# EXHIBIT E



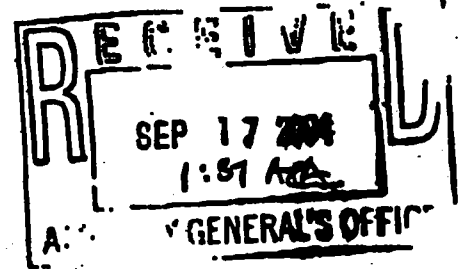
*Office of the Governor of Guam*

P.O. Box 2950 Hagåtña, Guam 96932

TEL (671) 473-8911 • FAX (671) 473-4826 • EMAIL: [gov@go.gu](mailto:gov@go.gu)

**Felix Perez Camacho**  
Governor

**Raleu Scott Moylan**  
Lieutenant Governor



16 SEP 2004

**Stephen A. Cohen**  
Assistant Attorney General  
(Office of the Attorney General  
Guam Judicial Center, Suite 2-200R  
120 West O'Brien Drive  
Hagåtña, Guam 96910

Re: Julie Babauta Santos v. Felix P. Camacho, Governor of Guam, et al;  
District Court of Guam, Civil Case No. 04-00006

Dear Steve:

We have reviewed the materials that you forwarded to our offices on September 9 from Mike Phillips. We have concerns regarding Mr. Phillips' proposal. I understand from Ray Souza that you described it as an attempt by Mr. Phillips to get a new settlement under the guise of an administration plan. We agree.

However, we have greater concerns regarding the settlement as a whole that we would like addressed before any consideration is given to Mr. Phillips' proposal. As you know, Governor Camacho was never consulted with regard to the June 2004 settlement agreement entered into by Attorney General Moylan and Acting Governor Moylan. Therefore, we would like this opportunity to raise the concerns the Governor has regarding the agreement.

The Governor's most significant concern is that the settlement is not contingent on legislative funding. This is a concern as a practical matter because the Legislature has failed to make an appropriation since the settlement was executed. However, even if the Legislature had made an appropriation, we would be concerned because we are unsure of whether the contract complies with Guam law.

Guam law forbids any officer of the Government of Guam from involving "the government of Guam in any contract or other obligation, for the payment of money for any purpose, in advance of the appropriation made for such purpose." 5 G.C.A. § 22401(a)(3); see *Pangelinan v. Gutierrez*, 2003 Guam 13 (2003), *reconsidered in part on other grounds* 2004 Guam 16. Further, Guam law forbids the participation in any contract that requires the expenditure of non-appropriated funds. See 5 G.C.A. § 22401(a)(2).

Based on these laws, we are concerned that the settlement agreement is invalid. We therefore require an explanation as to how the settlement agreement complies with Section 22401's ("Illegal Expenditures") provisions before we can further respond.

We also are concerned with certain structural problems that we see with the settlement agreement. It appears that under the settlement agreement, and under Mr. Phillips' proposed administrative plan, Mr. Phillips will receive 10% of the \$60 million no matter how many prospective class members may opt-out. Given that the settlement has not led to a complete peace for the Government, but instead gave birth to both the intervention motions and the new *Torres* case, we are concerned that the Government will be spending \$6 million to purchase a

settlement with only a limited number of plaintiffs while facing future liability to a greater number of plaintiffs. This is another area that we would like to have addressed in your response.

Further, as the agreement is written, the Government could end up paying the opt-in plaintiffs 100% if there are a substantial number of opt-outs. Given the potentially strong defenses that existed to the class action and lack of any litigation in the case, we would like to know what procedural safeguards exist regarding this matter.

We also would like a better understanding of how the determination was made to include what appear to be time-barred claims. Related to this, we would like to know why claims from 1996 were favored in the settlement, even though those claims are arguably less meritorious given the statute of limitations issue.

The final concern we have regarding the settlement is our lack of knowledge of the history of the negotiations of the settlement. We want to review all information concerning the settlement and its negotiations so that we are fully informed prior to the hearing. Therefore, please transmit to us the information you have on the negotiations, including the materials exchanged in negotiating the settlement, how fees were agreed to in the settlement, letters and memos regarding compliance with Guam's illegal expenditure laws (§ 22401), and any other information that may be relevant. We want to review this information to evaluate Mr. Phillips' request and to give your office instructions on how to proceed. Further, we want to ensure that all such information is preserved during any litigation relating to EITC.

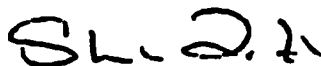
Assuming our concerns regarding the settlement are addressed, we also have concerns regarding Mr. Phillips' proposal. The objective of the plan appears to be securing payments of attorneys' fees as each payment is made into the settlement fund. Any condition permitting lawyers to receive fees before amounts are actually disbursed to class members is obviously unacceptable to the Governor.

Next, Mr. Phillips' plan seeks to place the burden of almost one million dollars in administration costs on the Government. This would appear to be another unappropriated expenditure, and on that ground alone the Governor must refuse. Further, one million dollars would be a material change to the settlement at a time when we all know the Government of Guam continues to be strapped for cash.

Lastly, we are concerned that the proposed dates in the administrative plan are all in the immediate future. Given the appeal filed by one of the would-be interveners, it would be of concern to us were the settlement to be approved before the appeal is resolved. It would be unfortunate if funds were distributed, only to have the settlement thrown out based on the appeal.

We realize that we have raised multiple issues, responding to which will require some effort. However, we hope that you are able to respond quickly as some of the issues (particularly with regard to the illegal expenditures issue) place the Governor in a position where he may need to act. Thank you for your time on this matter.

Very truly yours.



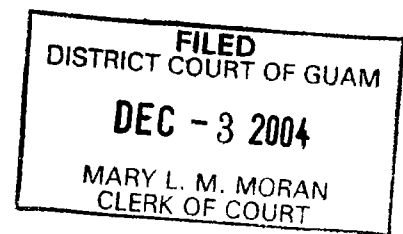
Shannon Taitano



# EXHIBIT F

VAN DE VELD SHIMIZU CANTO & FISHER  
Suite 101 De La Corte Bldg.  
167 East Marine Corps Drive  
Hagatna Guam 96910  
671.472.1131

TOUSLEY BRAIN STEPHENS PLLC  
Kim D. Stephens, P.S., WSBA #11984  
Nancy A. Pacharzina, WSBA #25946  
700 Fifth Avenue, Suite 5600  
Seattle, Washington 98104-5056  
206.682.5600



*Attorneys for Plaintiffs Christina Naputi and Mary Grace Simpao.*

DISTRICT COURT OF GUAM

TERRITORY OF GUAM

MARY GRACE SIMPAO, CHRISTINA  
NAPUTI on behalf of themselves and a class  
of others similarly situated,

Civil Case No. **04-00049**

Plaintiffs,

**COMPLAINT**

v.

GOVERNMENT OF GUAM

**CLASS ACTION**

Defendants.

**I. INTRODUCTION**

1.1 Plaintiffs bring this action on behalf of themselves and all others similarly situated who paid income taxes on Guam.

1.2 . They seek redress for, and to put an end to, the unfairness and uncertainty associated with the income tax Earned Income Credit (the "EIC"), as it has been administered by the government of Guam (the "Government").

1 1.3 Prior to 1995, the Government provided its taxpayers a means to claim the EIC  
2 and routinely processed such claims. In tax year 1994 more than 9,400 Guam taxpayers  
3 received approximately \$11 million in EIC payments.

4 1.4 But in tax years 1995 and 1996, the Government wrongly represented on its  
5 published tax return forms that the EIC was "inapplicable in Guam." Guam tax payers who  
6 filed an income tax return and qualified for the EIC in those years were provided no mechanism  
7 or procedure to make a claim for their EIC, other than filing their general, income-tax return.  
8 Not surprisingly, the Government did not compute or refund any EICs rightfully due qualifying  
9 taxpayers in those years.

10 1.5 In tax years 1997 and 1998, the Government once again provided a mechanism  
11 for those filing an income tax return to claim the EIC. As before, the procedure included filling  
12 out a section of the income tax form applicable to the EIC, and filing a supplemental form  
13 specifically for the EIC claim.

14 1.6 Based upon information and belief, the Government paid only a portion of the  
15 EICs legitimately claimed for 1997 and paid none of the EICs claimed for 1998.

16 1.7 Then, in tax years 1999 through 2003, the Government returned to its behavior  
17 of 1995 and 1996. Once again, the Government wrongly represented on its published tax  
18 return forms that the EIC was "Not applicable" and, in some years, obscured or placed  
19 cross-hatching over the EIC claims section of the return. Once again, qualifying taxpayers  
20 were provided no mechanism or procedure to make a claim for their EIC other than filing their  
21 general, income-tax return. And once again, the Government did not compute or refund any  
22 EICs rightfully due qualifying taxpayers.

23 1.8 Inexplicably, however, in 2004 one taxpayer was paid an EIC he had claimed  
24 for tax year 1998. The Government also indicated it might pay some claims but not others

25 1.9 Through this action, Plaintiffs who qualified for the EIC in 1995–2003 seek to  
26 establish they have either (1) already made timely claims for their EICs by filing income tax

1 returns or that the returns they have already filed are at the least sufficient to allow amendment  
2 of an EIC claim; and/or (2) in the alternative, still have the right to make such claims for the tax  
3 years 1995, 1996 and 1999-2003.

4 1.10 In the latter case, Plaintiffs also seek to require the Government to: (1) notify all  
5 taxpayers who filed a tax return in 1995, 1996 and 1999-2003 that, if they were eligible for the  
6 EIC in any or all of those years, they have a right to file a claim for the EIC; (2) to provide all  
7 such taxpayers a procedural mechanism to make a claim for an EIC; and (3) to ensure the  
8 Government continues to provide a mechanism for eligible Guam tax payers to make specific  
9 claims for an EIC on future income tax return forms.

10 1.11 Finally, Plaintiffs seek refund of the EIC overpayments due all eligible  
11 taxpayers who filed a timely claim for an EIC in any or all of tax years 1995-2003 but did not  
12 receive the corresponding EIC refund or offset to their income tax liability; and for those who  
13 will file a timely claim for an EIC pursuant to the relief described in Paragraph 1.9, or in the  
14 future.

## 15 II. JURISDICTION AND VENUE

16 2.1 The Court has original jurisdiction over this matter pursuant to 48 U.S.C.  
17 §§ 1421i(h) and 1424, and 28 U.S.C. §§ 1330 and 1361.

## 18 III. THE PARTIES

19 3.1 Plaintiff Naputi is a resident of Guam, paid income taxes and filed income tax  
20 returns for tax years 2001-2003. Plaintiff Naputi was eligible for the EIC for tax years 2001-03  
21 and was prevented from making the claim in tax years 2001-2003. She received her EIC for  
22 none of these years. Plaintiff Naputi expects to qualify for the EIC for tax year 2004.

23 3.2 Plaintiff Simpao is a resident of Guam, paid income taxes and filed income tax  
24 returns for tax years 1996-2003. Plaintiff Naputi was eligible for the EIC for tax years 1996,  
25 1997, 1998, 2002-03 and was prevented from making the claim in tax years 1996, 2001-2003.  
26

1 She received her EIC for none of these years. Plaintiff Simpao expects to qualify for the EIC  
2 for tax year 2004.

3 3.3 Defendant the Government of Guam is an organized unincorporated territory of  
4 the United States of America, formed August 1, 1950, by enactment of the Organic Act,  
5 48 U.S.C. § 1421 *et seq.* Defendant is a sovereign government entity.

#### 6 IV. FACTUAL ALLEGATIONS

##### 7 A. History of the EIC in Guam

8 4.1 The Organic Act provides that the income tax applicable to Guam taxpayers  
9 must mirror the income tax applicable to United States citizens under certain provisions of the  
10 United States Internal Revenue Service Code (IRC). One of these mirroring provisions,  
11 Subtitle A of the IRC, contains the EIC.

12 4.2 The EIC became effective in the U.S., and, therefore, in Guam, in 1975.

13 4.3 On information and belief, the Government provided a mechanism for its  
14 citizens to make claims for the EIC and paid the credit due from 1975 through 1994.

15 4.4 In fact, more than 9,400 Guam taxpayers received approximately \$11 million in  
16 EIC payments for tax year 1994.

17 4.5 On June 23, 1989, the Government, through its Attorney General's office (the  
18 "AG"), expressly acknowledged it is obligated to pay the EIC to eligible taxpayers in the same  
19 manner as ordinary tax refunds, *i.e.*, from the General Fund. *See* Memorandum Opinion  
20 No. DOA 89-0750 (the "1989 AG Opinion").

21 4.6 Six years later, however, the Director of the Department of Revenue and  
22 Taxation (the "Department") unilaterally decided to terminate the EIC in Guam.

23 4.7 In direct contradiction to the 1989 AG Opinion, the Department issued Revenue  
24 Ruling 96-001 (the "1996 Revenue Ruling") stating the EIC did not apply to Guam and, even if  
25 it did, the Department could not certify EICs due for payment because the Legislature had  
26 made no appropriation to fund the EIC.

1           4.8     On January 4, 1996, Guam's AG at the time, issued Memorandum Opinion No.  
2 DRT/DOA 96-001 (the "1996 AG Opinion") adopting the Department's misguided 1996  
3 Revenue Ruling.

4           4.9     As a result of the 1996 AG Opinion and Revenue Ruling, the 1996 tax return  
5 forms published by the Government included the words "not applicable in Guam" over the  
6 section providing taxpayers a mechanism to claim the EIC. Further, no specific form to claim  
7 the EIC was made available to taxpayers. On information and belief this was true of 1995  
8 income tax returns as well.

9           4.10    The Government did not compute or pay any individual EICs for either tax year  
10 1995 or 1996.

11          4.11    In response to the Executive Branch's unilateral reversal of tax policy, in 1997  
12 the Legislative Branch of the Government passed several laws to implement the Guam Earned  
13 Income Program (the "Guam EIC") and to ensure continuous funding of the Program. *See*  
14 Public Law 23-74, 11 Guam Code Ann. §§ 42101 et seq.

15          4.12    As such, the 1997 and 1998 income tax forms published by the Government  
16 included a mechanism for eligible taxpayers to specifically claim the EIC.

17          4.13    The Government paid some, but not all, EICs for the 1997 tax year.

18          4.14    The Government did not pay any EICs for the 1998 tax year.

19          4.15    The 1999-2003 income tax forms published by the Government once again  
20 included the words "Not Applicable" over the section providing the mechanism to claim the  
21 EIC. Once again the Government did not provide a supplemental form to make a specific  
22 claim for the EIC.

23          4.16    Instead, despite the action of the Legislatures in 1997, the Executive Branch  
24 once again refused to implement the EIC.

25          4.17    The Government did not change its conduct even though in 2001, the Supreme  
26 Court of Guam, at the request of the Legislative Branch, published an opinion stating the

1 Organic Act required Guam taxpayers receive the benefits of the EIC and thus, the Director of  
2 the Department is obligated to pay the EIC to eligible Guam taxpayers.<sup>1</sup>

3 4.18 The Government has not calculated or paid any EICs for the 1995, 1996, 1999-  
4 2003 tax years with one exception.

5 4.19 In 2004, the Government paid an EIC to one taxpayer who persistently  
6 complained to the Governor he was entitled to the credit and who, upon information and belief,  
7 claimed the EIC in 1998. No other taxpayers have received an EIC refund for tax year 1998 or  
8 any year subsequent.

9 **B. The Plaintiff's Experience With the EIC**

10 1. Plaintiff Naputi

11 4.20 Plaintiff Naputi has been a resident of Guam during all relevant tax years. In  
12 2001 she filed as "single", In 2002 as "married filing jointly" and in 2003 as "single" and had  
13 one qualifying child in each tax year. She never had a taxable income greater than that allowed  
14 to qualify for the EIC. In each tax year she provided all information requested on the form  
15 relevant to her as a taxpayer.

16 4.21 Naputi estimates she qualified for an EIC of \$1,200.00 in 2001, \$1,466.00 in  
17 2002 and \$1,964.00 in 2003.

18 4.22 Naputi did not receive an EIC payment or offset against their taxes for any of  
19 those tax years.

20 4.23 Naputi never received a formal notice of disallowance of her claims to an EIC,  
21 nor did she waive her right to such notice for any of the tax years.

22 4.24 Naputi expects she will qualify for the EIC in 2004.  
23  
24  
25

26 <sup>1</sup> *In Re Request of I Mina' Bente Sing'ko Na Liheslaturan Guahan Relative to the Application of the Earned  
Income Tax Credit Program to Guam Taxpayers ("the EIC question")*, 2001 Guam 3 at 9.

2. Plaintiff Simpao

4.25 Plaintiff Simpao has been a resident of Guam during all relevant tax years. In 1996 she filed as "single" with one qualifying child, in 1997 she filed as "married filing jointly" with one qualifying child, in 1998 she filed as "married filing jointly" with two qualifying children, in 1999 she filed as "married filing separately" with one qualifying child, in 2000 she filed as "married filing separately" with one qualifying child, in 2001 she filed as "married filing separately" with two qualifying children, in 2002 as "head of household" with two qualifying children, and in 2003 as "head of household" with three qualifying children. She never had a taxable income greater than that allowed to qualify for the EIC. In each tax year she provided all information requested on the form relevant to her as a taxpayer.

4.26 In tax years 1997 and 1998 she qualified for and claimed the EIC by completing the provided Guam Earned Income Program Application (GEIPA).

4.27 Simpao estimates she qualified for an EIC of \$1,750.00 in 1996, \$837.00 in 1997, \$868.00 in 1998, \$3,128.00 in 2002 and \$2,984.00 in 2003.

4.28 Based upon information and belief, Simpao did not receive an EIC payment or offset against her taxes for any of those tax years.

4.29 Simpao never received a formal notice of disallowance of her claims to an EIC, nor did she waive her right to such notices for any of the tax years.

4.30 Simpao expects she will qualify for the EIC in 2004.

**C. Tax payers' efforts to recover the EIC through litigation**

4.31 On February 12, 2004, Julie Babauta Santos filed a class action complaint seeking to recover the unpaid EICs due Guam taxpayers for tax years 1998 through 2003.<sup>2</sup> See *Santos v. Camacho, et al.*, No. 04-00006, District Court of Guam, February 12, 2004.

---

<sup>2</sup> Santos Complaint



1 4.32 Santos sought to certify a class of “all Guam taxpayers who were and are  
2 entitled to be paid . . . [EICs],” presumably for tax years 1998–2003, irrespective of each  
3 taxpayer’s compliance with administrative income tax filing procedures.

4 4.33 Santos sought actual refund of the EIC or in the alternative a writ compelling the  
5 Government to implement the “EIC” and to pay EICs due for those tax years.<sup>3</sup>

6 4.34 Approximately five months after the Santos action was filed, the Court entered a  
7 “Stipulated Order Granting Preliminary Approval of Class Action Settlement.”

8 4.35 The settlement class was expanded to include: “all persons who (a) filed Guam  
9 tax returns and (b) were and are entitled to be paid . . . [EICs] for any or all of the following tax  
10 years: 1996, and 1998 . . . [through] 2003.”

11 4.36 Concerned that the *Santos* action was procedurally and substantively flawed,  
12 Plaintiff Naputi sought to intervene. Her petition to intervene was denied August 5, 2004. *See*  
13 August 5, 2004 Order in *Santos v. Camacho, et al.*, No. 04-00006, District Court of Guam. In  
14 the Order denying the Petition, the Court noted the proper procedure for Plaintiff Naputi, and  
15 others who sought to intervene, was to participate in the *Santos* action as objectors or to file a  
16 parallel action of their own. *Id.* at 5.

17 4.37 This Complaint in the Nature of a Class Action Petition represents Plaintiffs’  
18 efforts (1) to secure specific relief for themselves and other Guam tax payers not addressed in  
19 the *Santos* action; and (2) where the claims overlap with those in the *Santos* action, to bring  
20 those claims in a procedural posture more likely to produce some or all of the relief, sought for  
21 themselves and for the class they seek to represent.

## 22 V. CLASS ACTION ALLEGATIONS

### 23 A. The Proposed Classes

24 5.1 Plaintiffs seek to certify three separate but related classes: a “Claims Made”  
25 Class, a “Refund” Class, and a “Future Refund” Class.

26 <sup>3</sup> *Id.*

1           I. The Claims Made Class

2           5.2     The Claims Made Class seeks to ensure all its class members have been or are  
3 afforded the opportunity to file a timely and allowable administrative claim for any EIC to  
4 which they were entitled in tax years 1995, 1996, and 1999-2003.<sup>4</sup>

5           5.3     The Claims Made Class is defined as:

6                   All Guam income tax payers who, for any or all of tax years,  
7                   1995, 1996 and 1999-2003 were: (1) eligible to claim an EIC  
8                   pursuant to the Organic Act and/or the Guam EIC; (2) filed a  
9                   sufficient tax return; and (3) have not received a refund or an  
10                  overpayment associated with their EIC claim, nor has such  
11                  overpayment been applied to their tax liability.

12           5.4     The Claims Made Class includes a subclass consisting of Potentially Time  
13 Barred Claims. The subclass is defined as: all members of the Claims Made Class who were  
14 eligible for an EIC and filed a tax return for tax years 1995, 1996 and 1999.<sup>5</sup>

15           5.5     The specific relief sought for the Claims Made Class, as a whole, consists of  
16 either: (i) declaratory relief stating the tax returns they have already filed constitute timely and  
17 allowable claims for refund of the overpayment associated with their EICs, or are sufficient to  
18 allow amendment of such claims; or, alternatively, (ii) injunctive relief requiring the  
19 Government to provide class members notice of their entitlement to the EIC and a procedure  
20 and schedule under which such claims should be made.

21           5.6     The additional or alternative relief sought for the Potentially Time Barred  
22 Subclass includes declaratory relief that the Government is estopped from asserting the  
23 applicable statutory limitations period to bar Plaintiffs from filing claims now for refund of  
24

25 <sup>4</sup> Tax years 1997 and 1998 are excluded from this class because, on information and belief the Government of  
26 Guam provided an adequate EIC claims mechanism and procedure for those tax years. Should discovery indicate  
adequate claims procedures were not provided, Plaintiffs preserve their right to amend the Complaint to include  
tax payers with claims based on their 1997 and 1998 tax returns to the Claims Made Class.

<sup>5</sup> Tax year 2000 is not included because in the potentially Time Barred Claims Class the Santos action tolled the  
time period for filing an EIC claim as of February 12, 2004. Absent tolling, the limitations period for tax year  
2000 would have expired April 15, 2004. If tolling does not apply, tax payers asserting claims for tax year 2000  
should be included in the Potentially Time Barred Subclass.

1 1995, 1996, and 1999-2003 EIC overpayments. Such claims may be filed within a reasonable  
2 time as set by the Court.

3 II. The Refund Class

4 5.7 The "Refund Class" is defined as:

5 all Guam income tax payers who, for any or all of tax years 1995-  
6 2003, were: (1) eligible to receive the EIC pursuant to the  
7 Organic Act and/or the Guam EIC, (2) filed a timely and  
8 allowable administrative claim for refund of the overpayment of  
9 their EIC, and (3) have not received a refund of the overpayment  
10 nor has the overpayment been applied to offset their tax liability.  
For purposes of this class definition a "timely and allowable  
administrative claim" includes claims filed pursuant to any relief  
granted any portion of the "Claims Made Class," as well as  
claims timely filed pursuant to applicable provisions of the tax  
code.

11 5.8 The relief sought for the Refund Class is payment of the refund due based on the  
12 EIC claims, with interest, plus attorneys' fees and costs.

13 III. The Future Refund Class

14 5.9 The Future Refund Class includes:

15 all Guam citizens who, for any or all of tax year 2000 and any  
16 subsequent year in which the EIC remains authorized by law: (1)  
17 were or will be eligible to receive the EIC pursuant to either the  
18 Organic Act and/or the Guam EIC, (2) have not yet filed a tax  
19 return; (3) are still able to file a timely and allowable  
20 administrative claim, pursuant to 26 U.S.C. § 6511, for refund of  
an overpayment associated with an EIC to which they are  
entitled; and (4) have not received a refund of an overpayment  
associated with an EIC, nor has such an overpayment been  
applied to offset their tax liability.

21 5.10 The relief sought for the Future Refund Class includes declaratory relief that the  
22 EIC applies to Guam taxpayers either through the Organic Act or pursuant to the Guam EIC  
23 and that the Government is obligated to pay, in a time and manner required by law, class  
24 members' properly made administrative claims for refund of an overpayment associated with  
25 an EIC to which they are entitled.  
26

**B. The Requirements of Fed. R. Civ. P. 23 (a)**

5.11 All of these classes meet the prerequisites of Fed. R. Civ. P. 23(a) for a class action.

5.12 The classes consist of thousands of Guam's poorest taxpayers making joinder of all members impracticable.

5.13 There are numerous questions of law or fact common to the classes.

5.14 Questions common to all classes include the following:

5.15 Whether pursuant to the Organic Act or the Guam EIC, the Government was and/or is required to refund income tax overpayments and/or offset income tax liabilities in response to tax payers' administratively sufficient claims made for an EIC.

5.16 Whether the Government has, in the manner and time required by law, refunded Plaintiffs' overpayments associated with properly made claims for an EIC.

5.17 Questions common to the claims made class include, among others, all of the following:

5.18 Whether Guam tax payers are entitled to notice now, that they were entitled to claim the EIC on income tax returns for tax years 1995, 1996 and 1999-2003.

5.19 Whether the Government wrongly represented on published tax forms and through other means that the EUIC was unavailable to Guam taxpayers in any or all of tax years 1995, 1996, 1999-2003.

5.20 Whether the Government provided notice and a process for EIC claims sufficient to satisfy the basic requirements of Due Process for tax years 1995, 1996 and 1999-2003.

5.21 Whether the Government has waived any requirement that taxpayers who filed income tax returns for tax years 1995, 1996 and 1999-2003 are required to make a more sufficient claim for an EIC.

5.22 Whether Plaintiffs are entitled to the declaratory relief requested in ¶5.5.

1           5.23   Whether the Government acted in bad faith in 1996 when it terminated the EIC  
2 made applicable to Guam tax payers through the Organic Act.

3           5.24   Whether the Government acted in bad faith in 1999 and all years subsequent  
4 when it refused to pay EIC claims and/or provide notice and a procedure to make EIC claims  
5 despite provisions of the Organic Act and the Guam EIC requiring it to do so.

6           5.25   Whether the EIC claims of the Potentially Time Barred subclass are, in fact,  
7 time barred, in light of the Governments conduct directed toward all subclass members.

8           5.26   Whether the Government's conduct has caused a serious injustice.

9           5.27   Whether payment of EIC claims will cause the public's interest to suffer undue  
10 damage.

11          5.28   Whether the Government has provided a clear and certain post-deprivation  
12 remedy by which Plaintiffs could have claimed their right to a refund of EIC overpayments to  
13 which they were entitled

14          5.29   Whether Plaintiffs who were denied a post-deprivation remedy have no  
15 alternative adequate remedy at law, thus entitling them to the injunctive relief requested in ¶ 5.5  
16 and 5.6.

17          5.30   The claims of the class representatives proposed for each class are typical of the  
18 claims of the class members in each class, in that each named Plaintiff was denied access to  
19 their EIC despite having filed a sufficient tax return.

20          5.31   Because their interests are identically aligned, the proposed class representatives  
21 will fairly and adequately protect the interest of the Classes. In addition, the named plaintiffs  
22 have engaged counsel with significant experience prosecuting similar class actions.

23 **C. The Requirements of Fed. R. Civ. P. 23(b)**

24          5.32   The Claims Made Class and Future Refund Classes meet all requirements for  
25 class certification under Fed R. Civ. P. 23(b)(1) and (b)(2).  
26

1           5.33    The prosecution of separate actions by individual class members will create a  
2 risk of inconsistent or incompatible standards as to which EIC claims already made must be  
3 paid to the Government; and which claims, if any, will be paid in the future.

4           5.34    The prosecution of any one individual action could, as a practical matter, be  
5 dispositive of the interest of members in both classes, thus substantially impairing or impeding  
6 their ability to protect their interests.

7           5.35    The Government has acted and refused to act on grounds applicable to all  
8 members of both classes, thereby making appropriate declaratory and injunctive relief with  
9 respect to the classes as a whole.

10          5.36    The Refund Class also meets the requirements for certification under Fed R.  
11 Civ. P. 23(b)(3).

12          5.37    The questions of law and fact common to the Refund Class predominate over  
13 any questions affecting only individual class members.

14          5.38    The class action is superior to other available methods for the fair and efficient  
15 adjudication of the controversy.

16          5.39    In particular, individual class members' have little incentive and ability to  
17 prosecute this action on their own. By definition these individuals do not have extra resources  
18 available to prosecute claims against the Government. Further, each individual's damages are  
19 relatively small, ranging from a few hundred dollars to no more than \$5000 dollars per tax year.  
20 Thus, a class action may be the class members' only way to recover their damages or to at least  
21 establish their right to make a claim for a refund. Further, concentration of the individual  
22 claims in one action will conserve judicial resources and promote consistency in the treatment  
23 of each class members' claim.

## VI. CLAIMS

### A. Claim One – Action for Declaratory Relief Regarding Sufficiency of Certain EIC Administrative Claims Already Made

6.1 Plaintiffs incorporate by reference all allegations made in the preceding paragraphs as if fully stated herein.

6.2 Plaintiffs assert this claim on behalf of themselves and all members of the Claims Made Class.

6.3 Unless otherwise stated all allegations are for any or all of tax years 1995, 1996 and 1999-2003.

6.4 The Government assessed and collected income tax from Plaintiffs.

6.5 Plaintiffs filed sufficient income tax returns.

6.6 Plaintiffs were eligible for an EIC in one or all of the tax years for which they filed a sufficient return.

6.7 An EIC represents an overpayment of taxes in the amount of the EIC.

6.8 The Government is required to refund properly claimed overpayments or use them to off set tax liabilities pursuant to 26 U.S.C. § 6402(a).

6.9 The Government provided no notice to Plaintiffs they were entitled to the EIC.

6.10 The Government affirmatively misrepresented to Plaintiffs they were not entitled to the EIC.

6.11 The Government provided no procedural mechanism for Plaintiffs to make a specific claim for an overpayment associated with an EIC consistent with the mechanism the Government provided prior to 1995 and in 1997 and 1998.

6.12 To the extent Plaintiffs' income tax returns were claims for EICs, the Government has investigated and acted on Plaintiffs' claim by (1) affirmatively stating it is not required to pay EIC claims; and (2) not refunding in the time and manner required by law, the amount of overpayment associated with the EICs to which Plaintiffs are entitled.



1           6.13    As such, the Government has waived any regulatory requirement that Plaintiffs  
2 must file a more specific claim for their EIC other than the income tax returns already filed.

3           6.14    Plaintiffs are entitled to a declaratory judgment that the income tax returns they  
4 have already filed are adequate to exhaust administration remedies as required by 26 U.S.C. §  
5 7422(a), such that Plaintiffs are eligible to bring a tax refund action for all years they were  
6 eligible for the EIC.

7    **B.    Claim Two — Action for Declaratory Relief Regarding Application of 26**  
8    **U.S.C. § 6511 to Certain Plaintiffs' Right to Claim an EIC**

9           6.15    Plaintiffs incorporate by reference all allegations made in the preceding --  
10 paragraphs as if fully stated herein.

11          6.16    Plaintiffs assert this claim on behalf of themselves and all members of the  
12 Potentially Time Barred Subclass of the Claims Made Class.

13          6.17    Unless otherwise stated all allegations are for any or all of tax years 1995, 1996  
14 and 1999.

15          6.18    The Government affirmatively, and non-negligently, represented to Plaintiffs  
16 they were not entitled to the EIC through published rulings, oral comments and by printing  
17 "Not applicable in Guam" or "Not applicable" and cross hatching or otherwise obscuring that  
18 section of the official government tax return form applicable to the EIC.

19          6.19    The Government provided no procedural mechanism for Plaintiffs to make a  
20 claim for an overpayment associated with an EIC consistent with the mechanism the  
21 Government provided prior to 1995 and in 1997 and 1998.

22          6.20    The Government knew Plaintiffs were entitled to the EIC under the Organic Act  
23 and/or the Guam EIC, or at the very least, that there was a dispute as to whether Plaintiffs were  
24 entitled to the EIC.

25          6.21    The Government intended Plaintiffs to refrain from making claims for  
26 overpayments associated with EICs based on its conduct; and/or, Plaintiffs had a right to



1 believe the Government intended them to refrain from making claims for overpayments  
2 associated with EICs based on its conduct.

3 6.22 Plaintiffs did not know if they were entitled to the EIC, even though they  
4 believed they were eligible for the EIC.

5 6.23 Plaintiffs relied on the Government's conduct to their detriment in that they did  
6 not make timely claims for, and have not received a refund of, overpayments associated with  
7 the EIC to which they are entitled, nor has such overpayment been applied to their tax liability.

8 6.24 Absent the relief requested in Claim One or in this Claim, Plaintiffs' EIC claims,  
9 for a tax refund are time barred pursuant to 26 U.S.C. § 6511.

10 6.25 The Government's conduct has caused a serious injustice in that Guam's poorest  
11 taxpayers have been deprived of their right to claim a tax credit specifically developed for  
12 them,

13 6.26 The public's interest will not suffer undue damage by allowing Plaintiffs to  
14 claim the EIC they were always entitled to.

15 6.27 Plaintiffs are entitled to a declaratory judgment that the Government is estopped  
16 from asserting the applicable statutory limitations periods of 26 USC 6511 to bar them from  
17 filing a civil action claim for a refund pursuant to 26 USC § 7422.

18 **C. Claim Three – For Injunctive Declaratory Relief Providing Notice of the**  
19 **Entitlement to the EIC and Availability of a Procedure to Make a Claim for**  
20 **Refund of an EIC Overpayment**

21 6.28 Plaintiffs incorporate by reference all allegations made in the preceding  
22 paragraphs as if fully stated herein.

23 6.29 Plaintiffs assert this claim on behalf of themselves and all members of the  
24 Claims Made Class, in addition, and as an alternative, to Claim One.

25 6.30 Unless otherwise stated all allegations are for any or all of tax years 1995, 1996  
26 and 1999-2003.

1           6.31   Plaintiffs are eligible to file a timely and allowable claim for refund of any EIC  
2 overpayments, either pursuant to 26 U.S.C. § 6511 or pursuant to relief granted certain  
3 Plaintiffs under Claim Two.

4           6.32   The Government, however, in violation of the Due Process Clause of the Fifth  
5 Amendment, has provided no clear and certain post-deprivation remedy by which Plaintiffs  
6 could or can claim their right to a refund of any EIC overpayments to which they were or are  
7 entitled.

8           6.33   Plaintiffs private property interest in their refund is significant.

9           6.34   The risk Plaintiffs will wrongly be permanently deprived of their overpayment  
10 through the procedures used by the Government is substantial.

11          6.35   The value of providing additional specific notice for these Plaintiffs is great as  
12 they have no other way of knowing they are entitled to claim an EIC refund.

13          6.36   The Government's interest in not providing the notice is small.

14          6.37   Plaintiffs only remedy at law to recover their overpayment is predicated on  
15 exhausting post-deprivation remedies and the Government has prevented them from doing so.  
16 Thus, Plaintiffs have no adequate remedy at law.

17          6.38   Plaintiffs are entitled to injunctive relief requiring the Government to notify  
18 them of their entitlement to make a claim for a refund of any EIC overpayment to which they  
19 were or are entitled, and to inform them of the procedure and schedule under which such claims  
20 can be made.

21          6.39   Plaintiffs are entitled to Declaratory Relief stating the Government is required to  
22 refund to them any overpayment associated with an EIC properly claimed under the relief  
23 provided in ¶ 6.40.

24 **D.    Claim Four — Claim for Refund of Tax Overpayment Pursuant to 26 U.S.C. § 7422**

25          6.40   Plaintiffs incorporate by reference all allegations made in the preceding  
26 paragraphs as if fully stated herein.

1           6.41    Plaintiffs assert this claim on behalf of themselves and all members of the  
2 Refund Class.

3           6.42    Unless otherwise stated all allegations are for any or all of tax years 1995-2003.

4           6.43    Plaintiffs have complied with 26 USC § 7422 by filing sufficient administrative  
5 claims for refund of overpayments associated with EICs to which they are entitled. The  
6 administrative claims are both timely and allowable either pursuant to 26 U.S.C. § 6511, or  
7 pursuant to the relief granted in Claims 1, 2, or 3.

8           6.44    The Government is required to refund Plaintiffs' properly claimed overpayment  
9 pursuant to 26 U.S.C. § 6402(a).

10          6.45    The Government has not, in the manner and time required by law, refunded  
11 Plaintiffs' overpayments associated with EICs to which they are entitled, or used the  
12 overpayments to offset Plaintiffs' tax liability

13          6.46    Plaintiffs are entitled to payment of their refund, with interest, plus attorneys  
14 fees and costs.

15 **E.    Claim Five — Claim for Declaratory Relief re Future Refunds of Tax**  
16 **Overpayments Associated with the EIC**

17          6.47    Plaintiffs incorporate by reference all allegations made in the preceding  
18 paragraphs as if fully stated herein.

19          6.48    Plaintiffs assert this claim on behalf of themselves and all members of the  
20 Future Refund Class.

21          6.49    Unless otherwise stated, all allegations are for any or all of tax year 2000 and  
22 any subsequent year in which the EIC remains authorized by law.

23          6.50    The Government has, or will, assess and collect income tax from Plaintiffs.

24          6.51    Plaintiffs were, or will be, eligible for an EIC in one or all of the applicable tax  
25 years. The EIC entitles, or will entitle, Plaintiffs to a refund of an overpayment or application  
26 of the overpayment to offset their tax liability.

6.52 Plaintiffs are still able to file timely and allowable administrative claims, pursuant to either 26 U.S.C. § 6511 or the relief granted in response to Claim Three, for refund of the overpayment associated with EICs to which they are, or will be, entitled.

6.53 The Government is required to refund overpayments for which a proper administrative claim is made pursuant to 26 U.S.C. §6402 and 6511.

6.54 Since 1996, the Government has not, on any consistent basis, provided notice of any taxpayer's entitlement to the EIC, provided a procedural mechanism for taxpayers to make a claim for an EIC overpayment consistent with mechanisms provided in the past, or paid timely and allowable claims for refunds of EIC overpayments. Some administrative claims have been paid, others have not.

6.55 Since June 23, 1989 , the date of first AG's opinion], the Government has represented that Plaintiffs are both entitled to the EIC and that they are not.

6.56 Absent resolution and notice of the status of the EIC in Guam, Plaintiffs cannot modify their conduct related to taxable income to ensure they take advantage of applicable tax laws. In addition, Plaintiffs are, or will be, forced to incur time and expense associated with filing a potentially futile administrative claim, or risk losing entitlement to their claim altogether.

6.57 As such, Plaintiffs seek declaratory relief that the EIC applies to Guam taxpayers and the Government will be obligated to pay, in the time and manner required by law, Plaintiffs' properly made administrative claims for refund of overpayments associated with EICs to which they are entitled.

## VII. PRAYER FOR RELIEF

7.0 Wherefore, Plaintiffs on behalf of themselves and the classes they seek to represent, request the Court enter judgment against Defendant and in favor of Plaintiffs and Class Members, and to award the following relief:

1           7.1     Enter an Order certifying the proposed classes and where applicable, subclasses  
2 and/or issues;

3           7.2     Declare that the EIC is applicable in Guam such that the Defendant is obligated  
4 to refund to Plaintiffs and all members of the Claims Made, Refund and Future Refund Classes,  
5 in the time and manner required by law, the overpayments associated with properly claimed  
6 EICs.

7           7.3     Declare that the 1995, 1996 and 1999-2003 income tax returns already filed by  
8 Plaintiffs and all members of the Claims Made Class adequately exhaust administrative  
9 remedies as required by 26 U.S.C. § 7422(a) such that Plaintiffs and class members are eligible  
10 to bring a tax refund action to recover overpayments associated with their EIC, for all years  
11 they were eligible for the EIC.

12          7.4     Declare that the 1995, 1996 and 1999-2003 income tax returns already filed by  
13 Plaintiffs and the members of the Claims Made Class are sufficient to allow amendment of an  
14 EIC claim as of the date of judgment and until a date certain as set by the Court;

15          7.5     Declare that Plaintiffs and all members of the Potentially Time Barred Subclass  
16 of the Claims Made Class are not time barred from asserting claims for refunds of the  
17 overpayment associated with EICs for which they were eligible in tax years 1995, 1996 and  
18 1999.

19          7.6     Enter an order requiring Defendant to notify Plaintiffs and all members of the  
20 Claims Made Class of their entitlement to make a claim for any EIC overpayment to which  
21 they were or are entitled and establishing a procedure and schedule for such claims to be made.

22          7.7     Award Plaintiffs and all members of the Refund Class income tax refunds in  
23 amounts to be proven at trial;

24          7.8     Award pre- and post-judgment interest as allowed by law;

25          7.9     Award attorneys' fees and costs of suit as allowed by law; and

26          7.10    Award any such other relief the Court deems just and equitable.

1  
2 DATED this 3<sup>rd</sup> day of December, 2004.  
3  
4

5 VAN DE VELD SHIMIZU CANTO & FISHER  
6 TOUSLEY BRAINS STEPHENS PLLC

7 By: Thomas J. Fisher  
8 Thomas J. Fisher, Esq.  
9 Attorneys for Plaintiffs  
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# EXHIBIT G

**FILED**

DISTRICT COURT OF GUAM

MAR 17 2005

MARY L.M. MORAN  
CLERK OF COURT

DISTRICT COURT OF GUAM  
TERRITORY OF GUAM

MARY GRACE SIMPAO,  
CHRISTINA NAPUTI on  
behalf of themselves  
and a class of others  
similarly situated

Plaintiffs,

v.

GOVERNMENT OF GUAM

Defendant.

CV 04-00049

**ORDER**

On March 17, 2005, the Court heard Defendant's Motion to Dismiss the First Amended Complaint ("FAC"). Having considered all papers and argument submitted in the matter, the Court now rules as follows:



1           **I.       INTRODUCTION**

2           Plaintiffs Mary Grace Simpoa and Christina Naputi, on  
3 behalf of themselves and a class of others similarly  
4 situated, (collectively "Plaintiffs") bring this action  
5 against the Government of Guam for inconsistency in  
6 acknowledging the applicability of the Earned Income Credit  
7 ("EIC").  
8

9           Primarily before the Court is Defendant's Motion to  
10 Dismiss for Lack of Subject Matter Jurisdiction and Failure  
11 to State a Claim upon which relief can be granted pursuant  
12 to the Federal Rules of Civil Procedure 12(b)(1) and (6).<sup>1</sup>  
13

14           **II.     BACKGROUND**

15           The Organic Act imposes several Internal Revenue Codes  
16 on Guam residents. See 48 U.S.C. § 1421 et seq. Within  
17 those tax codes is the EIC, which was enacted in 1975. The  
18 EIC provides some tax benefits to low-income workers in the  
19 hopes that these benefits will make working more attractive  
20 that welfare.  
21

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22           <sup>1</sup>In conjunction with their Motion to Dismiss, Defendant filed  
23 several other motions including: 1) Defendant's Objection to  
24 Plaintiff's Stated Intention to File a Second Opposition to  
25 Defendant's Motion to Dismiss FAC and Motion to Strike if Second  
26 Opposition is Filed; 2) Motion to Shorten Time for Hearing or  
Consideration of Defendant's Objection; and 3) Motion to Strike  
Plaintiffs' March 8, 2004 Opposition for Using Less Than a Standard 12  
Point Font Type and Failure to Meet Court's Limitation of 20 pages.

1 Prior to 1995, Defendant allowed Plaintiffs to claim  
2 the EIC, and subsequently processed thousands of claims.  
3 During the 1995-1996 tax years, Defendant represented on its  
4 tax forms that the EIC was "inapplicable in Guam." In those  
5 years, Defendant did not allow Plaintiffs to claim credits  
6 and did not issue refunds associated with EIC. During the  
7 1997-1998 tax years, Defendant once again allowed Plaintiffs  
8 to claim EIC, however they paid only a portion of the 1997  
9 claims and only one 1998 claim.<sup>2</sup> During the 1999-2003 tax  
10 years, Defendant again represented that the EIC was  
11 inapplicable to Guam residents. Plaintiffs allege there  
12 were no other mechanisms for applying for an EIC during  
13 those years.

14  
15 On December 3, 2004, Plaintiffs filed a complaint  
16 against Defendant seeking declaratory judgments regarding  
17 the applicability of the EIC to Guam residents and refunds  
18 from tax overpayments. On February 1, 2005, Plaintiffs  
19 filed the FAC with six specific claims: 1) Declaratory  
20 relief regarding sufficiency of Certain EIC Administrative  
21 Claims already made; 2) Declaratory relief regarding the  
22 application of 26 U.S.C. § 6511 to certain Plaintiffs' Right  
23 to Claim an EIC; 3) Injunctive Declaratory relief providing  
24 notice of the entitlement to the EIC and availability of a  
25

---

26 <sup>2</sup>The 1998 claim was not paid out until 2004.

1 procedure to make a refund claim; 4) Refund of tax  
2 overpayment; 5) Declaratory relief regarding future refunds  
3 of EIC overpayments; and 6) Injunctive relief requiring  
4 Defendant to establish an EIC reserve and trust fund.  
5

6 In the instant matter, Defendant contends Plaintiffs'  
7 FAC should be dismissed for lack of subject matter  
8 jurisdiction and failure to state a claim. Defendant's  
9 contention is based on several distinct arguments including  
10 state immunity, failure to exhaust administrative remedies,  
11 statute of limitations, applicability of the Declaratory  
12 Judgment and Anti-injunctive Acts, and improper proposed  
13 classes. This matter was originally set for March 11, 2005,  
14 but the Court partially granted the parties' stipulation for  
15 continuance, which moved the hearing to March 17, 2005.  
16

### 17 **III. DISCUSSION**

#### 18 **A. Subject Matter Jurisdiction**

19 Defendant first contends Plaintiffs' FAC should be  
20 dismissed for lack of subject matter jurisdiction.  
21

##### 22 **1. Legal Standard: Subject Matter Jurisdiction**

23 Federal courts are courts of limited jurisdiction.  
24 Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374, 98  
25 S. Ct. 2396, 2403 (1978). A federal court has jurisdiction  
26 over actions that either arise under federal law, or where

1 the amount in controversy exceeds \$75,000 and is between (1)  
2 citizens of different States; (2) citizens of a State and  
3 citizens or subjects of a foreign state; (3) citizens of  
4 different States and citizens or subjects of a foreign state  
5 that are additional parties; or (4) a foreign state as  
6 plaintiff and citizens of a State or different States.  
7 See 28 U.S.C. §§ 1331, 1332(a).

8  
9 The plaintiff bears the burden of establishing subject  
10 matter jurisdiction, and the court presumes lack of  
11 jurisdiction until the plaintiff proves otherwise. Kokkonen  
12 v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377  
13 (1994); Stock West, Inc. v. Confederated Tribes, 873 F.2d  
14 1221, 1225 (9th Cir. 1989).

15  
16 Pursuant to Fed. R. Civ. Proc. 12(b)(1), subject matter  
17 jurisdiction may be challenged at any time. Albrecht v.  
18 Lund, 845 F.2d 193, 194 (9th Cir. 1988). If the court  
19 concludes that it lacks jurisdiction over the subject matter  
20 of the complaint, it must dismiss the action. See Fed. R.  
21 Civ. Proc. 12(h)(3).

## 22 23 **2. Analysis: Subject Matter Jurisdiction**

24 Plaintiffs have pled sufficient facts to give the Court  
25 jurisdiction under 48 U.S.C. § 1424 and 48 U.S.C. § 1421i(h)  
26 which states, "the District Court of Guam shall have

1 exclusive original jurisdiction over all judicial  
2 proceedings in Guam...with respect to the Guam Territorial  
3 income tax." 48 U.S.C. § 1421i(h). This case pertains  
4 directly to the income tax filings of Guam residents. Thus,  
5 as a general matter, this case presents a federal question  
6 over which the Court has subject matter jurisdiction.  
7

8 Defendant also alleges a lack of subject matter  
9 jurisdiction in three specific areas. Defendant argues the  
10 Court lacks jurisdiction over Plaintiffs' first through  
11 fifth claims because: 1) Defendant has sovereign immunity;  
12 2) Plaintiffs failed to exhaust administrative remedies;  
13 and, 3) should the Court find that subject matter  
14 jurisdiction does not exist with respect to Plaintiffs'  
15 first through fifth claims, the Court cannot exercise  
16 supplemental jurisdiction over the sixth claim.  
17

#### 18 **a. Sovereign Immunity**

19 Defendant first contends the Court lacks subject matter  
20 jurisdiction because the Defendant has sovereign immunity.  
21 Indeed, in Crain v. Gov. of Guam, the Ninth Circuit held  
22 that Defendant had sovereign immunity and could not be sued  
23 without permission. 195 F.2d 414 (9<sup>th</sup> Cir. 1952). The  
24 Ninth Circuit later found, however, that 28 U.S.C. §  
25 1421i(h), which gives the Court jurisdiction over the Guam  
26 Territorial Income Tax ("GTIT"), is effectively a waiver of

1 immunity, and thereby grants the Court jurisdiction over  
2 Defendant. See Forbes v. Maddox, 339 F.2d 387 (9<sup>th</sup> Cir.  
3 1964).

4  
5 Accordingly, the Court can exercise jurisdiction, as  
6 Defendant cannot claim sovereign immunity.

7  
8 **b. Administrative Remedies**

9 Defendant next contends Plaintiffs' first through fifth  
10 claims should be dismissed for failure to exhaust  
11 administrative remedies.<sup>3</sup>

12  
13 The tax code states, "no suit or proceeding shall be  
14 maintained in any court for the recovery of any ... [refund]  
15 ... until a claim for refund or credit has been duly filed."  
16 26 U.S.C. § 7422(a).

17  
18 Plaintiffs argue the mere filing of a tax return,  
19 without any specific application for the EIC, constitutes a  
20 claim. This argument is unpersuasive as it effectively  
21 places the burden on Defendant to determine whether someone  
22 is eligible for a refund or credit. See United States v.  
23 Felt & Tarrant Mfg. Co., 283 U.S. 269 (1931).

24  
25  
26 <sup>3</sup>Because Plaintiffs did file EIC requests in 1997 and 1998,  
Defendant's argument does not relate to those years.

1        Nevertheless, because Defendant affirmatively prevented  
2 Plaintiffs from filing EIC claims by blocking out the  
3 relevant section on tax returns with the words "inapplicable  
4 in Guam." Any attempt to claim and EIC credit would have  
5 been futile. Thus, Defendant's argument is unpersuasive in  
6 that there were no additional administrative remedies  
7 available, and further exhaustion would have been futile.<sup>4</sup>  
8

9                    **c. Monetary Relief**

10        Defendant next contends Plaintiffs' fourth claim,  
11 refund of tax overpayment, should be dismissed for lack of  
12 jurisdiction because the Court cannot grant monetary relief  
13 under 26 U.S.C. § 7422(a), unless Plaintiffs first exhaust  
14 administrative remedies.  
15

16        Again, the tax code states, "no suit or proceeding  
17 shall be maintained in any court for the recovery of any ...  
18 [refund] ... until a claim for refund or credit has been  
19 duly filed." 26 U.S.C. § 7422(a). In their FAC, Plaintiffs  
20 allege they did file "sufficient administrative claims for  
21

---

22        <sup>4</sup>Curiously, in the declaration of Thomas J. Fisher, Plaintiffs  
23 submitted Guam's EIC application form for the 1995-1996 and 1999-2004  
24 tax years. Although it is unclear how these forms support Plaintiffs'  
25 arguments as they suggest Plaintiffs should have filled them out, the  
26 alleged facts taken in light most favorable to the Plaintiffs suggest  
that Defendant effectively prevented any exhaustion of administrative  
remedies.

1 refund of overpayments associated with EIC's to which they  
2 are entitled." Complaint at ¶ 6.43. Thus, Plaintiffs  
3 allege sufficient facts to support an exhaustion of  
4 administrative remedies. Because Plaintiffs pled that a  
5 refund claim was filed and Defendant has yet to pay,  
6 Plaintiffs' suit is proper under 26 U.S.C. § 7422(a), and  
7 the Court may grant monetary relief if deemed appropriate.  
8

#### 9 **d. Supplemental Jurisdiction**

10 Defendant next contends that Plaintiffs' Sixth Claim,  
11 injunctive relief requiring the Defendant to comply with  
12 provisions of 11 G.C.A. §§ 50101 and 51101 in establishing  
13 an EIC reserve fund and trust fund, should be dismissed for  
14 lack of subject matter jurisdiction. Because the Court has  
15 jurisdiction of the other claims under 48 U.S.C. §§ 1421i(h)  
16 and 1424, Defendant's argument fails in that the Court can  
17 exercise supplemental jurisdiction over Plaintiff's Sixth  
18 Claim under 28 U.S.C § 1367(a).  
19

#### 20 **B. Failure to State a Claim**

21 Defendant also contends Plaintiffs' first through sixth  
22 claims in their FAC should be dismissed for failure to state  
23 a claim upon which the Court can grant relief.  
24

##### 25 **1. Legal Standard: Failure to State a Claim**

26



1 In a Rule 12(b)(6) motion to dismiss, the Court must  
2 presume all factual allegations of the complaint to be true  
3 and draw all reasonable inferences in favor of the non-  
4 moving party. Klarfeld v. United States, 944 F.2d 583, 585  
5 (9th Cir. 1991). A dismissal can be based on the lack of  
6 cognizable legal theory or the lack of sufficient facts  
7 alleged under a cognizable legal theory. Balistreri v.  
8 Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988). A  
9 party need not, however, state the legal basis for his  
10 claim, only the facts underlying it. McCalden v. California  
11 Library Ass'n, 955 F.2d 1214, 1223 (9th Cir. 1990).

12  
13 A complaint should not be dismissed for failure to  
14 state a claim unless it appears beyond doubt that the  
15 plaintiff can prove no set of facts in support of his claim  
16 that would entitle him to relief. Conley v. Gibson, 355  
17 U.S. 41, 45-46 (1957); Klarfeld, 944 F.2d at 585; Usher v.  
18 City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987) see  
19 also, NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th  
20 Cir. 1986). The court need not, however, accept conclusory  
21 allegations or unreasonable inferences as true. Western  
22 Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

## 23 24 25 **2. Analysis: Failure to State a Claim**

26 Specifically, Defendant argues Plaintiffs' FAC fails to

1 state a claim because: 1) claims are barred by the  
2 applicable statute of limitations; 2) declaratory judgments  
3 are not available remedies; 3) injunctive relief is not an  
4 available remedy; and, 4) Plaintiffs' proposed classes do  
5 not meet the requirements of Fed. R. Civ. Pro. 23.

6  
7  
8 **a. Statute of Limitations**

9 Defendant first contends Plaintiffs' first through  
10 fifth claims are barred by the statute of limitations. This  
11 contention is primarily based on Defendant's argument that  
12 Plaintiffs' claims should be reclassified as a 42 U.S.C. §  
13 1983 Civil Rights action, and therefore be subjected to a  
14 two-year limitations period.

15  
16 Plaintiffs, however, never classified their claims as  
17 civil rights violations and have not sought damages for  
18 denial of fundamental Constitutional rights. Although they  
19 allege that they have been deprived of their rights and  
20 privileges granted by law, see 42 U.S.C. § 1983, Defendant  
21 may not reclassify Plaintiffs' claims to avoid liability.  
22 Accordingly, a two-year statute of limitations period is not  
23 appropriate.

24  
25 Defendant in the alternative, contends that all EIC  
26

1 refund claims prior to 2001 should be barred by the  
2 limitations period set forth in 26 U.S.C. § 6511(a). The  
3 Internal Revenue Code states that all refund claims "shall  
4 be filed by the taxpayer within 3 years from the time the  
5 return was filed or 2 years from the time the tax was paid,  
6 whichever of such periods expires the later." 26 U.S.C. §  
7 6511(a). Furthermore, the Court also notes the Supreme  
8 Court's elimination of the possibility of equitable tolling  
9 by declaring, "[s]ection 6511's detail, its technical  
10 language, the iteration of the limitations in both  
11 procedural and substantive forms, and the explicit listing  
12 of exceptions...indicate to us that Congress did not intend  
13 courts to read other unmentioned, open-ended, "equitable"  
14 exceptions into the statute." United States v. Brockamp,  
15 519 U.S. 347, 352 (1997). Thus, any argument by Plaintiffs  
16 that the Statute of Limitations should be tolled due to any  
17 action by Defendant cannot survive.

18  
19 Plaintiffs argue that the mere filing of their tax  
20 returns constitutes an EIC claim. Plaintiffs argue that  
21 their general filing of a tax return constitutes "a claim"  
22 because the tax return contained the relevant information  
23 for EIC eligibility. Again, the Court finds this argument  
24 unpersuasive because although the Defendant determines how  
25 much of an EIC refund is due, it is not their burden to  
26

1 determine whether an individual qualifies for a tax credit.  
2 Taken to the extreme, Plaintiffs' argument suggests that  
3 taxpayers should simply send any relevant paperwork to the  
4 IRS and require the government to play the role of H&R Block  
5 in determining how best to calculate and individual's tax  
6 liability.

7  
8       Regardless of this argument by Plaintiffs, their FAC  
9 alleges that sufficient administrative refund claims  
10 associated with EICs were timely filed pursuant to 26 U.S.C.  
11 § 6511(a). See Complaint at ¶ 6.43. Although specific  
12 facts regarding these administrative claims are lacking in  
13 the Complaint, Plaintiffs' conclusory statement is  
14 sufficient to survive a motion to dismiss, as the Court must  
15 interpret the facts in the light most favorable to  
16 Plaintiffs. Therefore, the Court can concludes that the  
17 statute of limitations does not bar Plaintiffs' claims.  
18  
19

#### 20       **b. The Declaratory Judgment Act**

21       Defendant next contends Plaintiffs' FAC should be  
22 dismissed for failure to state a claim because declaratory  
23 judgments are not available in cases involving federal taxes  
24 or the Guam Territorial Income Tax. The Declaratory  
25 Judgment Act states,  
26

1 "[i]n a case of actual controversy within its  
2 jurisdiction, except with respect to Federal taxes  
3 other than actions brought under section 7428 of the  
4 Internal Revenue Code of 1986, ... any court of the  
United States ... may declare the rights and other  
legal relations of any interested party seeking  
declaration, whether or not further relief is or could  
be sought."

5 28 U.S.C. § 2201(a). Section 7428 applies to the  
6 classification of organizations, which is not at issue in  
7 this case. See 28 U.S.C. § 7428.

8  
9  
10 Defendant first argues declaratory judgment is not  
11 available because it is not specifically mentioned in the  
12 GTIT as a remedy. The GTIT, however, does not specifically  
13 mention available remedies of any kind. See 28 U.S.C. §  
14 2201. Although there are some limitations on enforcing the  
15 GTIT, there is no indication these limitations extend beyond  
16 the executive branch. See 48 U.S.C. § 1421i(d)(2). Because  
17 Plaintiffs' claim falls within the jurisdiction of the  
18 Court, declaratory judgment is available. See 28 U.S.C. §  
19 2201(a).

20  
21 Defendant also argues Plaintiffs cannot receive  
22 declaratory judgment because the GTIT is a federal tax, to  
23 which the Declaratory Judgement Act does not apply. See 28  
24 U.S.C. § 2201(a). The Ninth Circuit, however, has  
25 repeatedly held that the GTIT is a territorial tax, and not  
26 a federal tax. See Bank of America v. Chaco, 539 F.2d 1226,

1 1227 (9<sup>th</sup> Cir. 1976); Forbes v. Maddox, 339 F.2d 387, 389  
2 (9<sup>th</sup> Cir. 1964); Phelan v. Taitano, 233 F.2d 117, 118 (9<sup>th</sup>  
3 Cir. 1956). Thus, the Declaratory Judgment Act is  
4 applicable to Plaintiffs' claim.<sup>5</sup>

5  
6  
7 **c. The Anti-Injunctive Act**

8 Defendant next contends Plaintiffs' third claim for  
9 Injunctive Declaratory Relief should be dismissed for  
10 failure to state a claim because the Anti-Injunctive Act  
11 bars Plaintiffs' claim.

12  
13 The Anti-Injunctive acts provides, "no suit for the  
14 purpose of restraining the assessment or collection of any  
15 tax shall be maintained in any court by any person." 26  
16 U.S.C. § 7421(a). Plaintiffs persuasively argue that their  
17 suit is not brought for the purpose of restraining the  
18 assessment of collection of any tax, but for the enforcement  
19 of the EIC. Because assessment and collection of taxes has  
20 already taken place, Plaintiffs' suit does not restrain or  
21 interfere in those activities. See Sorenson v. Sec'y of the  
22 Treasury, 557 F. Supp. 729 (D. Wash. 1982), *aff'd*, 752 F.2d

23  
24 <sup>5</sup>Although Defendant is now contesting the applicability of the  
25 Declaratory Judgment Act, the Court notes that it relied on the same  
26 act to seek relief from the Supreme Court of Guam when Guam's  
legislative branch attempted to force the executive branch to  
implement the EIC. See In re Request of I Mina' Bente Sing'ko Na  
Lihelaturan Guahna, 2001 Guam 3 (2001).

1 1433 (9<sup>th</sup> Cir. 1985), *aff'd*, 475 U.S. 851 (1986).  
2 Accordingly, the Anti-Injunctive Act does not bar  
3 Plaintiffs' claim.  
4

5 **d. Class Certification**  
6

7 Next, Defendant contends Plaintiffs' claims should be  
8 dismissed for failure to state a claim because the proposed  
9 classes do not meet the requirements of commonality and  
10 typicality as required by Fed. R. Civ. Pro. 23(a)(3) and  
11 (b)(3). This argument goes to whether certification of the  
12 proposed classes is proper. As Plaintiffs have not yet  
13 brought a motion to certify the classes, Defendant's  
14 argument is premature.  
15  
16

17 **IV. CONCLUSION**  
18

19 As a preliminary matter, Defendant has filed the  
20 following additional motions: (1) Objection to Plaintiffs'  
21 stated intention to file a second opposition and Motion to  
22 strike if second opposition is filed; (2) Motion to shorten  
23 time for hearing or consideration of Defendant's Objection  
24 to Plaintiffs' stated intention; (3) Motion to strike  
25 Plaintiffs' March 8, 2005 Opposition for using less than  
26 twelve point font and exceeding page limit; and (4) Motion  
to shorten time for hearing or consideration of Defendant's

1 motion to strike Plaintiffs' March 8, 2005 Opposition. The  
2 Court notes any formatting and procedural deficiencies, but  
3 **DENIES** all such motions and accordingly will rule on the  
4 substantive merits of the case.

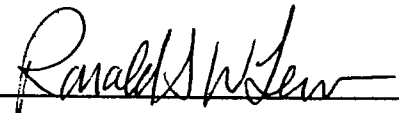
5  
6 The Court has valid subject matter jurisdiction over  
7 Plaintiffs' first through fifth claims under 48 U.S.C §§  
8 1421i(h) and 1424. Defendant cannot validly claim sovereign  
9 immunity and Plaintiffs have exhausted any administrative  
10 remedies which were not deliberately impeded by Defendant.  
11 Additionally, because the Court has valid subject matter  
12 jurisdiction over the first through fifth claims, it can  
13 validly exercise supplemental jurisdiction over Plaintiffs'  
14 sixth claim.

15  
16  
17 As to Defendant's argument that Plaintiffs' first  
18 through third and fifth claims should be dismissed for  
19 failure to state a claim upon which relief can be granted,  
20 the Court first finds that the statute of limitation does  
21 not bar any of Plaintiffs' claims. Second, the Declaratory  
22 Judgment and Anti-Injunctive Acts do not bar Plaintiffs'  
23 claims and do not prevent the Court from granting  
24 declaratory judgments and injunctions in Plaintiffs' case.  
25 Third improper class definition does not prevent Plaintiffs'  
26 case from proceeding at this stage, and Defendant is



1 premature in contesting possible certification.  
2 Accordingly, Defendant's Motion to Dismiss is **DENIED** in its  
3 entirety.

4 **IT IS SO ORDERED.**

5  
6  
7  
8   
9 **RONALD S.W. LEW**

United States District Judge

10 DATED: March 17, 2005  
11  
12  
13  
14  
15  
16  
17  
18

19 Notice is hereby given that this document was  
20 entered on the docket on MAR 18 2005.  
21 No separate notice of entry on the docket will  
22 be issued by this Court.

Mary L. M. Moran

Clerk, District Court of Guam

23 By: /s/ Shirlene A. Ishizu MAR 18 2005

24 Deputy Clerk

25 Date  
26

# EXHIBIT H

**FILED**  
DISTRICT COURT OF GUAM

JUN 15 2005

MARY L.M. MORAN  
CLERK OF COURT

DISTRICT COURT OF GUAM  
TERRITORY OF GUAM

MARY GRACE SIMPAO, CHRISTINA  
NAPUTI and JANICE CRUZ, on behalf of  
themselves and a class of others similarly  
situated,

Plaintiffs,

vs.

GOVERNMENT OF GUAM,

Defendant.

Civil Case No. 04-00049

ORDER

This matter is before the Court on the Plaintiffs' Partial Summary Judgment motion. *See* Docket No. 59. After hearing argument from counsel and reviewing the parties' submissions, as well as relevant caselaw and authority, the Court hereby memorializes the bases for its rulings herein.

**BACKGROUND**

In the tax years prior to 1995, Guam taxpayers claimed the Earned Income Tax Credit ("EIC") and the Government of Guam paid it.<sup>1</sup> However, in the years 1995 and 1996, the Government of Guam stopped paying the EIC. In 1996 the Department of Revenue and Taxation

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<sup>1</sup>The EIC also referred to as the EITC was first enacted by the United States Congress in 1975 and codified as Section 43 of the U.S. Internal Revenue Code of 1954. *See* U.S. Public Law 94-12, § 204. The EIC is a refundable Federal income tax credit for low-income working individuals and families. It allows an eligible individual to claim a tax credit against the amount of income tax liability, if any, on his or her annual income tax return.

1 (“DRT”) issued a ruling (“Revenue Ruling No. 96-001”) regarding whether the EIC applied in  
2 Guam under the Guam Territorial Income Tax (“GTIT”). *See* Canto Decl., at Exhibit C, attached  
3 thereto. It concluded that it did not. The Attorney General of Guam issued his own opinion on  
4 the matter and agreed with the DRT’s ruling. *Id.*, Exhibit B (“Attorney General of Guam  
5 Memorandum Opinion DRT/DOA 96-001 (‘1996 AG Opinion’)), attached thereto.

6 In light of the DRT’s ruling and Attorney General’s opinion, the Government of Guam  
7 published that EIC was inapplicable in Guam on its tax return forms for the years 1995 and 1996  
8 and 1999 through 2003.<sup>2</sup> *See* Answer at ¶ 3. For example, the 1999 1040A tax form contained  
9 the language “Not Applicable” where Earned Income Credit was listed. *See* Canto Decl.,  
10 Exhibit L, attached thereto.<sup>3</sup> For the years 1997 and 1998, such prohibitory language was not on  
11 the Government of Guam’s tax forms. *See Id.*, Exhibit E, attached thereto.

12 For tax years 1995 and 1996, the Government of Guam did not pay refunds associated  
13 with EICs. *See* Answer at ¶ 18. In the years 1997 and 1998, qualified Guam taxpayers could  
14 claim EIC on their tax returns. However, only some of the EIC claims were paid for the tax year  
15 1997 and with the exception of one individual taxpayer, no EICs were paid for the tax year 1998.  
16 *Id.* at ¶s 7, 21 and 23. No EICs were paid for the tax years of 1999 through 2003.

17 On January 12, 2005, the Governor of Guam issued an Executive Order indicating the  
18 Government would establish a procedure whereby EIC claims would become a part of a qualified  
19 taxpayer’s tax return. *See* Canto Decl., Exhibit F, attached thereto. Shortly after the Governor  
20 issued this order, the DRT published forms with which to make claims for the relevant tax years  
21 of 1995 through 2004. *Id.*, at Exhibit G, attached thereto.

22 The plaintiffs have collectively filed individual income tax returns with the Government  
23 of Guam during the tax years 1995 through 2003. *See* Canto Decl., at Exhibit L, attached thereto.  
24 None of the plaintiffs received an EIC offsetting the taxes paid during those years. Additionally,

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25  
26 <sup>2</sup>Guam issues its own 1040 forms.

27 <sup>3</sup> The plaintiffs in some of the years in question actually used the federal form 1040 which  
28 did not black out the EIC portion.

1 none of the plaintiffs filed an administrative claim for a refund of overpaid taxes. The plaintiffs,  
2 Mary Grace Simpoa, Christiana Naputi and Janice Cruz,<sup>4</sup> on behalf of themselves and a class of  
3 other similarly situated, ("plaintiffs") brought this action against the Government of Guam  
4 seeking declaratory relief regarding the applicability of the EIC to Guam taxpayers and refunds  
5 from tax overpayments.

## 6 DISCUSSION

7 The plaintiffs now move for partial summary judgment and seek the following relief: (1)  
8 A declaration that, under the GTIT, the EIC applies to Guam and requires refunds of properly  
9 claimed EIC claims; (2) A declaration that, by filing income tax returns that contain no claim for  
10 the EIC, the plaintiffs have nonetheless exhausted their administrative remedies as required by  
11 the GTIT as a condition precedent to bringing suit; (3) A declaration and injunctive relief  
12 requiring the Government of Guam to provide notice to plaintiffs of their right to file EIC claims  
13 and creating procedures for filing such claims under the GTIT, or alternatively, a declaration that  
14 the Government of Guam must refund EIC claims to plaintiffs upon filing proper amended tax  
15 returns containing an EIC claim under the GTIT; and (4) A declaration and injunctive relief that  
16 the Government of Guam must enforce certain local Guam laws concerning amounts that are  
17 alleged to be required to be set aside to pay the EIC.

18 Summary judgment is appropriate when the evidence, read in the light most favorable to  
19 the nonmoving party, demonstrates that there is no genuine issue as to any material fact, and the  
20 moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The party  
21 opposing summary judgment cannot rest on conclusory allegations, but must set forth specific  
22 facts showing that there is a genuine issue for trial. *Leer v. Murphy*, 844 F.2d 628, 631 (9<sup>th</sup> Cir.  
23 1988). Moreover, to defeat a summary judgment motion, the nonmoving party must come  
24 forward with evidence sufficient to establish the existence of any disputed element essential to  
25 that party's case, and for which that party will bear the burden of proof at trial. *Celotex Corp. v.*

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26  
27 <sup>4</sup>On April 14, 2005, when the summary judgment motion was filed, Janice Cruz, was not  
28 a named plaintiff. However, on April 18, 2005, plaintiffs filed a Second Amended Complaint  
wherein, plaintiff Cruz was added.

1 *Catrett*, 477 U.S. 317, 322, 102 S.Ct. 2548 (1986).

2 Before addressing the merits of the motion, the defendant makes a number of objections.  
3 The defendant first contends that the plaintiffs' motion is premature. The motion is based on the  
4 Second Amended Complaint. However, the motion was filed on April 14, 2005 and the Second  
5 Amended Complaint was filed on April 18, 2005, four days after the motion. The defendant  
6 claims that in filing the motion, the plaintiffs misrepresented that the Second Amended  
7 Complaint contained no new facts, "apart from the addition of the plaintiff. All of the  
8 defendant's answers therefore to the Second Amended Complaint are required to be identical to  
9 its answers to the First Amended Complaint, save for those referring to the newly added Plaintiff  
10 Janice Cruz." *See* Motion, p.2. The defendant claims that this is not true. This Court agrees. In  
11 comparing the First Amended Complaint with the Second Amended Complaint, the Court notes  
12 that there are changes in the Second Amended Complaint that pertain to the original plaintiffs,  
13 Ms. Simpao and Ms. Naputi.<sup>5</sup> Notwithstanding the changes to the Second Amended Complaint,  
14 the substance of the complaint remains the same. Moreover, the changes have no bearing on the  
15 relief sought in the motion requiring this Court to hold the motion in abeyance.

16 The defendant also argues that the Declaratory Judgment Act and Anti-Injunctive Relief  
17 Act prohibit the relief sought. The Declaratory Judgment Act states that:

18 [i]n a case of actual controversy within its jurisdiction, except with  
19 respect to Federal taxes other than actions brought under section  
20 7428 of the Internal Revenue Code of 1986 . . . any court of the  
21 United States . . . may declare the rights and other legal relations of  
22 any interested party seeking declaration, whether or not further  
23 relief is or could be sought.

24 28 U.S.C. § 2201(a).

25 The defendant argues that the Declaratory Judgment Act prohibits declaratory relief with  
26 respect to *federal taxes*. (Emphasis added.) However, in this instance, the plaintiffs argue that  
27 GTIT is not a federal tax so therefore the Declaratory Judgment Act does not bar the relief  
28

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29 <sup>5</sup>The plaintiffs are admonished that they are to exercise care in making representations to  
the Court and are cautioned that any further misrepresentations may result in the imposition of  
sanctions and/or other action deemed appropriate.

1 sought. This Court notes that this issue was discussed and ruled upon in the Court's prior Order  
2 concerning the defendant's motion to dismiss.<sup>6</sup> Honorable Ronald S.W. Lew agreed with the  
3 plaintiffs and found that the Declaratory Judgment Act did apply. Likewise, the Court addressed  
4 the applicability of the Anti-Injunction Act in its prior Order. The Anti-Injunction Act generally  
5 prohibits suits "for the purpose of restraining the assessment or collection of any tax." 26  
6 U.S.C. § 7421(a). Judge Lew held that the Anti-Injunction Act did not bar the plaintiffs' claims  
7 because the suit was not brought for the purpose of restraining the assessment or collection of  
8 taxes, but was instead brought for the applicability and enforcement of the EIC. This Court finds  
9 Judge Lew's rulings to be the law of the case and will not otherwise disturb them. *See United*  
10 *States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir.2000) ("Under the law of the case  
11 doctrine, 'a court is generally precluded from reconsidering an issue previously decided by the  
12 same court, or a higher court in the identical case.'").

13 Turning now to the real issue before the Court, does the EIC apply to Guam and if so,  
14 what actions must the Government of Guam take in order to administer it. At the outset of its  
15 discussion, the Court notes that this issue has been unsettled for years.

16 Apparently, the issue was first raised in 1989. The Attorney General concluded in  
17 Memorandum Opinion No. DOA 89-0750 to the Director of Administration ("DOA"), that Guam  
18 was obligated to pay the EIC in excess of the tax owing. *See Canto Decl.*, at Exhibit A, attached  
19 thereto. The Attorney General stated that:

20 Guam currently uses a mirror image of the Internal Revenue Codes  
21 as its basis for collecting income taxes. Some time ago, the  
22 Territory received the permission of Congress to enact its own tax  
23 code in the 1986 Tax Reform Act.<sup>7</sup> By Executive Order, we have  
24 established the Guam Tax Reform Commission to determine and  
recommend how we will delink from IRC. The Earned Income  
Credit (EIC) and its applicability to Guam is one of the issues  
currently before the Commission. We have been informed that  
Guam had previously received an annual reimbursement from the

---

25  
26 <sup>6</sup>See Order, Docket No. 53.

27 <sup>7</sup>In 1986, Congress authorized Guam to "de-link" from the I.R.C. and pass its own tax  
28 laws that would go into effect "upon an exchange of notes" by the governments of Guam and the  
United States. Tax Reform Act of 1986, §§ 1271, 1277(b), Pub.L. No. 99-514, 100 Stat.2085.

1 federal government amounting to several million dollars, but that  
2 the practice was halted during the administration of President  
Carter.

3 It appears that because we have the authority to delink from IRC,  
4 and yet choose not to do so (if only by our inaction), that we are in  
5 a position of being responsible for any shortfall resulting from  
6 following federal tax policies which are entirely discretionary upon  
us. We might be able to attempt to seek reimbursement for the  
estimated or actual shortfall caused by Earned Income Credit.  
However, the response of Congress is likely to be that we merely  
have to rewrite our local tax code to remove this burden.

7 A few years later, on or about January 4, 1996, the Attorney General revoked its earlier  
8 Memorandum Opinion DOA 89-0750 and adopted the DRT's Revenue Ruling 96-001.

9 See Canto Decl., at Exhibit B, attached thereto. The Attorney General decided that: (1) EIC was  
10 not applicable in Guam and should not be administered by DRT, and (2) DRT should not certify  
11 to the DOA for the payment of any amounts owing as refundable EIC. *Id.*

12 In response to the change in tax policy the Legislature enacted its own program (Guam  
13 Earned Income Program) to ensure that Guam's taxpayers would receive the EIC. See 11 Guam  
14 Code Ann. § 4108. The program mirrored the federal program under 26 U.S.C. § 32. However,  
15 the program was never implemented and in 2000, the Legislature filed a declaratory judgment  
16 action with Guam's Supreme Court asking for its opinion as to whether Guam's taxpayers were  
17 entitled to the EIC, pursuant to Subtitle A of the IRC and applied to Guam by the operation of the  
18 Organic Act, 48 U.S.C. § 1421 et seq. See *In re Request of I Mina 'Bente Sing' Kona*  
19 *Liheslaturan Guahan Relative to the Application of the Earned Income Tax Credit Program to*  
20 *Guam Taxpayers ("The EIC question")*, 2001 Guam 3, 2001 WL 113985 (Sup. Ct. Guam 2001).  
21 After providing a thorough description of the history of the EIC, the Guam Supreme Court held  
22 that the EIC must be applied in mirrored fashion to Guam. This Court agrees.

23 Guam's tax code is based on the Internal Revenue Code. It is made applicable to Guam  
24 by the Organic Act and by the provisions of the Code itself. Organic Act §1421i(k); Internal  
25 Revenue Code § 7651. In effect, the Congress established a mirror system of taxation.

26 The Organic Act of Guam states:

27 (a) Applicability of Federal laws; separate tax  
28



1 The income tax laws in force in the United States of America and  
2 those which may hereafter be enacted shall be held to be likewise  
3 in force in Guam: *Provided*, That notwithstanding any other  
4 provision of law, the Legislature of Guam may levy a separate tax  
5 on all taxpayers in an amount not to exceed 10 per centum of their  
6 annual income tax obligation to the Government of Guam.

7 (b) Guam Territorial income tax

8 The income-tax laws in force in Guam pursuant to subsection (a)  
9 of this section shall be deemed to impose separate Territorial  
10 income tax, payable to the government of Guam, which tax is  
11 designated the "Guam Territorial income tax."

12 48 U.S.C. § 1421i(a) and (b).

13 Title 48 U.S.C. § 1421i(d) adds:

14 (1) The income tax laws in force in Guam pursuant to subsection  
15 (a) of this section include but are not limited to the following  
16 provisions of the Internal Revenue Code of 1986, where not  
17 manifestly inapplicable or incompatible with the intent of this  
18 section: Subtitle A [26 U.S.C.A. § 1 et seq.] . . . and all provisions  
19 of subtitle F [26 U.S.C.A. § 6001 et. seq.] . . .

20 Section 31 of the Organic Act specifically lists the mirroring provisions, including  
21 Subtitle A of the I.R.C. which creates and defines the EIC.<sup>8</sup> The EIC was enacted in 1975 to  
22 provide tax benefits to low-income workers in the hopes that these benefits would make working  
23 more attractive than welfare. Since that time, Guam taxpayers applied for and received EICs  
24 until 1995 when the Government of Guam had a shift in tax policy and decided that it was not  
25 responsible for the payment of the EIC.

26 However, it would appear that the shift in policy was more attributable to a shortfall in  
27 the public coffers than one in legal reasoning. In DRT's Revenue Ruling No. 96-001, the  
28 director stated that "[a] definitive ruling by the Director of DRT is necessary at this time because  
GovGuam has experienced large amounts of lost revenue and cash outlays under the EITC."  
*See Canto Decl.*, at Exhibit C, attached thereto. Guam's taxpayers should not be made to pay for  
the financial woes of its sovereign. If Guam is unable to pay for the EIC, it alone, has the power  
to change its tax code by delinking from the IRC in accordance with the Tax Reform Act of

---

<sup>8</sup>Section 6401(a) of Subtitle F directs the taxing authority to refund the EIC to the taxpayer or credit the EIC overpayment against the taxpayer's liabilities.

1 1986, or by enacting an additional tax to cover its expenses. *See* 48 U.S.C. § 1421i(a). Short of  
2 those options, the Court finds that as a matter of law, Guam must pay the EIC.

3 Moreover, the Court notes that the defendant seemingly has conceded that the EIC applies  
4 to Guam. The defendant stated in its Clarification of Defendant's Opposition to Plaintiff's  
5 Motion for Partial Summary Judgment that "[t]he position of the Office of the Attorney General,  
6 on behalf of the Government of Guam, with respect to the Earned Income Tax Credit ("EIC") is  
7 set forth in the Settlement Agreement entered into on June 14, 2004 . . ."<sup>9</sup> That Settlement  
8 Agreement was attached as Exhibit A to a Stipulated Order Granting Preliminary Approval of  
9 Class Action Settlement. Some of the positions set forth in the Stipulated Order were as follows:

10 2. "EIC Class" means all persons who (a) filed Guam tax returns  
11 and (b) were and are entitled to be paid refundable earned income  
12 tax credits under the Guam Territorial Income Tax and the Earned  
Income Program for any or all of the following tax years: 1996,  
1998, 1999, 2000, 2001, 2002 and 2003.

13 3. The EIC Class members, otherwise eligible, are entitled to the  
14 Earned Income Tax Credit, pursuant to a provision in Subtitle A of  
the Internal Revenue Code and applied to Guam by operation of  
the Organic Act, 48 U.S.C. § 1421 et seq.

15 4. The Government of Guam is required to pay the Earned Income  
16 Tax Credit to eligible taxpayers.<sup>10</sup>

17 Additionally, the Government of Guam further stated "[t]he Government of Guam does not  
18 oppose the Motion for Partial Summary Judgment to the extent it will determine whether the EIC  
19 applies to the People of Guam as a matter of law."

20 Having decided that the EIC applies to Guam, the next question is whether the taxpayers  
21 exhausted their administrative remedies in claiming the EIC. According to 26 U.S.C. § 7422(a) a  
22 taxpayer is required to file a claim for a tax refund before filing suit.<sup>11</sup> However, in this instance,

---

23  
24 <sup>9</sup>*See* Clarification of Defendant's Opposition to Plaintiff's Motion for Partial Summary  
25 Judgment. Docket No. 81.

26 <sup>10</sup>*See* Certified Copy of Stipulated Order Granting Preliminary Approval of Class Action  
27 Settlement With Attached Settlement Agreement in Santos Case, CIV04-00006, Docket No. 82,  
page 2.

28 <sup>11</sup>26 U.S.C. § 7422 states:

1 the plaintiffs argue that the filing of an income tax return acts as a claim for the EIC, since the  
2 Government of Guam affirmatively took steps to prohibit a taxpayer from actually filing an EIC  
3 claim. The Government of Guam represented to the taxpayers that the EIC was inapplicable or  
4 not available on Guam. *See* Canto Decl., Exhibit L, attached thereto. The DRT's policy was to  
5 reject claims where individual taxpayers attempted to write EIC claims on their Guam tax forms,  
6 submit the U.S. versions of the forms (which did not block out the EIC box), submit the Form  
7 1040 X<sup>12</sup> or submit letters or informal claims. *See* Camacho Decl., at ¶ 9. It was DRT's policy  
8 to return such forms to the taxpayer and (sometimes) provide the taxpayer with a copy of the  
9 Revenue Ruling stating the EIC did not apply in Guam. This Court is concerned that the  
10 Government took actions that discouraged if not actually affirmatively prohibited the filing of a  
11 return with the request for the EIC. The Court therefore finds under the circumstances, the filing  
12 of the tax returns should be considered a claim satisfying the jurisdictional requirement under 26  
13 U.S.C. § 6511.<sup>13</sup>

14 The plaintiffs next seek declaratory and injunctive relief requiring the Government of  
15 Guam to provide notice to plaintiffs of their right to file EIC claims and creating procedures for  
16 filing such claims under the GTIT, or alternatively, a declaration that the Government of Guam  
17 must refund EIC claims to plaintiffs upon filing proper amended tax returns containing an EIC

---

18  
19 (a) No suit prior to filing claim for refund.

20 No suit or proceeding shall be maintained in any court for the  
21 recovery of any internal revenue tax alleged to have been  
22 erroneously or illegally assessed or collected, or of any penalty  
23 claimed to have been collected without authority, or of any sum  
24 alleged to have been excessive or in any manner wrongfully  
25 collected, until a claim for refund or credit has been duly filed with  
the Secretary, according to the provisions of law in that regard, and  
the regulations of the Secretary established pursuance thereof.

26 <sup>12</sup>As used in the federal system, Form 1040 X is used for amended tax claims.

27 <sup>13</sup>Although the Court has jurisdiction based on the filing of the claims, the Court will  
28 refrain at this time from addressing whether the statute of limitations would act as a bar to many  
of the claims pursued in a refund suit. *See* 26 U.S.C. § 6532(a)(1).

1 claim under the GTIT. The Government of Guam claims that this issue is moot and the request  
2 unnecessary as the Government of Guam is already accepting EIC claims and permitting the  
3 amendment of tax returns to facilitate such claims, to the extent permitted by federal and  
4 territorial law. *See* Camacho Decl., at Exhibit 2, attached thereto.

5 In January 2005, the Governor of Guam issued Executive Order 2005-001, requiring DRT  
6 to create supplemental EIC forms ("Guam Earned Income Credit Application") and to accept the  
7 submission of the EIC claims under territorial and, to the extent applicable, federal law.  
8 *See* Camacho Decl., at Exhibit 1, attached thereto. It applies to tax years 1995-1996 and 1999-  
9 2004, and into the future. *Id.* There are no forms for the years 1997-1998 because DRT had  
10 already created a form for the those years and had accepted claims. The Order expressly states  
11 that tax returns may be amended as part of such a submission, although amendments are limited  
12 to three years as provided under federal law. *Id.* Accompanying the forms is an EIC brochure  
13 prepared by DRT. *Id.* at Exhibit 4. Pursuant to the Executive Order, the EIC claims submitted  
14 under this procedure shall constitute sufficient claims for the EIC under the GTIT if the EIC is  
15 held to apply to Guam. *Id.* at Exhibit 1, ¶ 2. As of April 26, 2005, DRT has received 15,475  
16 claims for the EIC under the Executive Order. *Id.* at ¶ 14 and Exhibit 5.

17 The plaintiffs state that they are concerned that the forms contain qualifying language that  
18 would allow the Government of Guam to ignore its obligation to pay the EIC. The offending  
19 language is as follows:

20 By providing this form neither the Department of Revenue & Taxation nor any  
21 other part of the Government of Guam or its officers are agreeing to make any  
22 payment to any taxpayer or any offset in favor of any taxpayer or waiving any  
23 applicable law regarding submission of claims.

24 *See* Camacho Decl., at Exhibit 2.

25 The plaintiffs claim that since the Government of Guam is claiming there is no obligation  
26 to pay the EIC on the forms, the request for declaratory relief is not moot. This Court has  
27 reviewed the forms and notes that at the time they were created, the issue of the EIC had not been  
28 decided. It seems to reason that in drafting the documents, the Government wanted to preserve  
its rights should a Court subsequently rule that it had no legal obligation to pay the EIC. Despite

1 a history of non-payment by the Government, the Court finds the Government of Guam has taken  
2 efforts to create forms that would allow it to process the claims in the event it is found  
3 responsible for paying the claims.

4 Under the circumstances, the Court does not find the need to grant declaratory relief.  
5 Should the Government of Guam refuse to pay the claims after they have been found owing, the  
6 plaintiffs are free to take steps to enforce the payments. The Court is reluctant to grant  
7 declaratory relief where there is only the possibility of future harm. *Hodgers-Durgin v. de la*  
8 *Vina* 199 F.3d 1037, 1042 (9<sup>th</sup> Cir.,1999) (“The Supreme Court has repeatedly cautioned that,  
9 absent a threat of immediate and irreparable harm, the federal courts should not enjoin a state to  
10 conduct its business in a particular way.”). The Court notes that the plaintiffs’ complaint is also  
11 one for a refund. There is nothing preventing the plaintiffs from proceeding with this action.  
12 Accordingly, the Court denies the declaratory and injunctive relief as requested.

13 Lastly, the plaintiffs ask for injunctive relief requiring the Government of Guam to  
14 enforce certain local Guam law (11 Guam Code Ann. § 50101 et seq. and 11 Guam Code Ann. §  
15 51101 et seq.) concerning amounts that are alleged to be required to be set aside to pay the EIC.  
16 In 1999, the Legislature amended the Income Tax Reserve Fund law (the “Reserve Fund”), to  
17 create a yearly reserve fund to reserve tax receipts for the payment of income tax refunds, the  
18 child tax credit, and the EIC. 11 Guam Code Ann. § 50103. It also requires the DOA, DRT and  
19 the Bureau of Budget & Management Research to establish a yearly formula for how much  
20 money should be reserved from income tax receipts. *Id.* This formula is to be used by DOA to  
21 pay projected income tax refunds, child tax credits, and EIC. 11 Guam Code Ann. § 50104.

22 In addition to the Reserve Fund, the Legislature enacted the Income Tax Refund Efficient  
23 Payment Trust Fund Act of 2002 (the “Trust Fund”). The Trust Fund is supposed to receive  
24 weekly, quarterly, and monthly deposits (depending on the source) of payroll and other income  
25 taxes. 11 Guam Code Ann. § 50102. The formula for such deposits is supposed to be the same  
26 formula as the yearly account under the Reserve Fund, except that the money in the Trust Fund  
27 account is being reserved for the coming year and is supposed to be earning interest. *Id.* When  
28 DOA is ready to release tax refunds, child tax credits, or the EIC, the money is to be transferred

1 from the Trust Fund into the Reserve Fund, and to the taxpayers. *Id.*

2 The Government of Guam argues that the plaintiffs have no right to sue for the  
3 enforcement of the Reserve and Trust Fund laws. The Government of Guam states that these  
4 laws are local budget laws designed to benefit the Legislature with regard to expenditures of  
5 public funds. There is nothing in the laws themselves that create a generalized private cause of  
6 action, much less a right to seek injunctive relief. The plaintiffs therefore should be denied  
7 injunctive relief. *See Touche Ross & Co. v. Readington*, 442 U.S. 560, 568 (1979) (an implied  
8 cause of action can only be created under a statute if it is consistent with the intent of the  
9 legislature.)

10 The Government of Guam also states that it is complying with the laws to the degree  
11 permitted by the intervening budget laws. In 2004, the Guam Legislature passed its budget for  
12 fiscal year 2005, P.L. 27-106 (Bill 363), creating a tax refund reserve of \$72 million. There was  
13 no provision therein for the EIC or other reserves. *See* Guam P.L. 27-106. Based upon the  
14 current financial figures available to the Government, \$72 million is not sufficient to pay this  
15 year's estimated tax refunds and EIC. Decl. of Lourdes Perez, at ¶ 4.

16 According to the Director of the DOA, an injunction that requires the Government of  
17 Guam to immediately begin to set aside money for the EIC could cause a financial crisis. Decl.  
18 of Lourdes Perez, at ¶ 8. The Court is concerned about the consequences of ordering the  
19 Government of Guam to comply with these laws without a showing of actually how much money  
20 would be required and the effects that would have on the operations of the Government. Under  
21 the circumstances, the Court finds the request premature in light of the fact that the class has not  
22 been certified. There simply are not enough facts to indicate what sum of monies should actually  
23 be set aside. In addition, when the plaintiffs proceed with their refund suit, the Court can revisit  
24 the issue of how refunds are to be paid if found owing. Should the Government of Guam choose  
25 not to take action in paying its obligation, the Court can then take the appropriate action.  
26 Accordingly, the Court denies summary judgment as to this request.

27 ///


28 ///



CONCLUSION

In light of the foregoing, the Court grants partial summary judgment as to the issue of whether EIC applies to Guam and that, by filing income tax returns that contain no claim for the EIC, the plaintiffs have nonetheless exhausted their administrative remedies as required by the GTIT as a condition precedent to bringing suit. As to the other requests, the Court denies the relief sought. The plaintiffs are to take action to certify the class and proceed with this matter as a refund suit.<sup>14</sup>

SO ORDERED this 15 day of June, 2005.

  
RICARDO S. MARTINEZ  
Designated Judge

Notice is hereby given that this document was entered on the docket on JUN 15 2005. No separate notice of entry on the docket will be issued by this Court.

Mary L. M. Moran  
Clerk, District Court of Guam

By: /s/ Shirlene A. Ishizu  
Deputy Clerk

JUN 15 2005  
Date

<sup>14</sup>The Court notes the conspicuous absence of the United States as a party in this action. The Court questions whether there may be an equal protection argument in light of the fact that Guam taxpayers are not entitled to the Advance EIC and an offset of their social security taxes paid to the federal government.

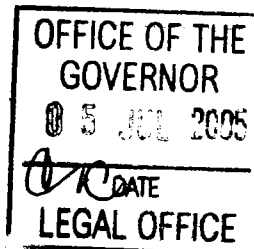
\*The Honorable Ricardo S. Martinez, United States District Judge for the Western District of Washington, by designation.

# EXHIBIT I



1 VAN DE VELD SHIMIZU CANTO & FISHER  
Suite 101 Dela Corte Building  
2 167 East Marine Corps Drive  
Hagåtña, Guam 96910  
3 671.472.1131

4 TOUSLEY BRAIN STEPHENS PLLC  
Kim D. Stephens, P.S., *Pro Hac Vice*  
5 Nancy A. Pacharzina, *Pro Hac Vice*  
700 Fifth Avenue, Suite 5600  
6 Seattle, Washington 98104-5056  
206.682.5600



**FILED**  
DISTRICT COURT OF GUAM

JUL - 5 2005  
MARY L.M. MORAN  
CLERK OF COURT

7 *Attorneys for Plaintiffs Mary Grace Simpao, Christina Naputi and Janice Cruz*

10 DISTRICT COURT OF GUAM

11 TERRITORY OF GUAM

12 MARY GRACE SIMPAO, CHRISTINA  
13 NAPUTI and JANICE CRUZ on behalf of  
themselves and a class of others similarly  
14 situated,

15 Plaintiffs,

16 v.

17 GOVERNMENT OF GUAM,

18 Defendant.

Civil Case No. 04-00049

PLAINTIFFS' MOTION FOR CLASS  
CERTIFICATION



19 I. INTRODUCTION

20 This case seeks to establish the right of all eligible Guam citizens to file for and recover  
21 Earned Income Credits (EICs) as required by Guam's tax laws. Its primary issues have already  
22 been resolved on behalf of the named Plaintiffs through summary judgment. Plaintiffs now ask  
23 the Court to extend those results to the Class as a whole and certify this case as a class action  
24 pursuant to Fed. R. Civ. P. 23.  
25  
26

1 **A. Plaintiffs' Claims**

2 Resolution of all claims in this action depends on the threshold holding Plaintiffs sought  
3 when the action was filed: an enforceable ruling that EIC provisions of the U.S. Internal  
4 Revenue Tax Code are applicable to Guam. The action then seeks various forms of relief to  
5 allow Plaintiffs and proposed Class members to file for and recover EICs wrongfully withheld.

6 Plaintiffs' Claims One, Two and Three seek declaratory and injunctive relief to  
7 establish who has timely filed (or still can timely file) an administrative EIC claim for the tax  
8 years at issue. This is a condition prerequisite not only to filing a claim for EICs, but also to  
9 this Court's jurisdiction over any action challenging denial of an EIC. The proposed Class for  
10 these claims consists of taxpayers who filed tax returns in years the Government prevented  
11 specific EIC claims from being filed, and affirmatively represented on tax refund forms that  
12 such claims were not applicable in Guam. Under statutory limitations periods, some of these  
13 claims (claims for tax years 1995, 1996 and 1999) could be time barred. A subclass is  
14 proposed for those claimants.

15 Plaintiffs' Fourth claim is a tax refund action seeking actual payment of EICs due. The  
16 proposed class for this claim consists of all taxpayers who timely filed an administrative claim  
17 for an EIC for tax years 1995 – 2003 either as declared by the Court in resolution of Claims  
18 One through Three, or by actually filing EIC claim forms the Government made available and  
19 accepted for tax years 1997 and 1998.

20 Plaintiffs' Fifth and Sixth claims seek to secure the right to make claims for EICs and  
21 efficiently receive EIC refunds for future tax years. The primary relief sought is an injunction  
22 ordering the Defendant to establish and fund certain reserve funds mandated by law specifically  
23 to ensure prompt and efficient payment of tax refunds and EICs.

24 **B. Relief Already Obtained**

25 The individual Plaintiffs have already won relief for the Class in two ways. First, they  
26 obtained summary judgment holding the following: (1) the EIC applies in Guam; and (2) in  
light of the Government's conduct in this matter, Plaintiffs are deemed to have exhausted

1 administrative remedies for *all* tax years at issue by timely filing tax returns for those years. In  
2 other words, the Government is estopped from asserting Plaintiffs did not comply with the time  
3 limits prescribed by 26 U.S.C. § 6511 for filing administrative claims.

4 Second, shortly after Plaintiffs filed their complaint requesting a mechanism be  
5 provided for filing EIC claims, the Government implemented an EIC claims application  
6 process. Final determination of the need for and scope of injunctive relief for a claims process  
7 in light of Government's action remains to be determined.

8 **C. Class Treatment is Desirable For Plaintiffs' Claims**

9 Tax refund actions like this one have been found suitable for class treatment where, as  
10 here, the Class includes only those who have exhausted administrative remedies. Here, such  
11 Class members are defined by whether they have or still can file a tax return for the relevant tax  
12 years — a fact easily and objectively determinable.

13 The threshold Rule 23(a) requirements for class certification are also easily met. The  
14 number of Class members is in the thousands, and to some degree, they are geographically  
15 dispersed. It is most likely not all Class members remain on Guam. Further, the issues  
16 presented are common to all claims, and the named Plaintiffs' claims are by definition typical  
17 of those of proposed Class members. Finally, Plaintiffs have retained counsel experienced in  
18 class actions.

19 Class treatment is also suitable under Rule 23 (b)(2). All Class members' claims are  
20 based on one common course of conduct by Defendant, that is, its uniform policy and practice  
21 of refusing to accept, process and pay claims for EICs due. The injury suffered by all class  
22 members is categorically the same — denial of their EIC benefit. And, the relief sought by  
23 each Class member is the same — the right to properly claim and recover EICs for which they  
24 are eligible. Importantly, eligibility for an EIC is objectively determinable through review of  
25 each Class members' tax return and EIC claim form. The amount due is prescribed by tax  
26

1 credit tables. It is no hindrance to class certification that the specific amount of EIC due each  
2 Class member may vary.

3 Finally, class treatment is not only suitable, it is desirable. Resolution of these claims in  
4 a single proceeding will conserve resources of both the parties and the Court. Perhaps most  
5 importantly, it may be the only way most Class members will receive any relief at all. The  
6 value of each individual claim is too small to justify pursuit on an individual basis, especially  
7 where Class members are known to be of limited resources and relatively unsophisticated.

8 This Court should certify this case for class treatment to extend Plaintiffs' summary  
9 judgment ruling and provide any further relief obtained to all Class members.

## 10 II. STATEMENT OF FACTS

### 11 A. The EIC

12 The Earned Income Credit provides a tax benefit to low income workers in the hopes  
13 the benefit will make working more attractive than welfare. Only taxpayers with an income  
14 below a certain level qualify for the credit. Once this threshold requirement is met, additional  
15 factors may effect whether a taxpayer qualifies for the credit and the amount of credit due (e.g.  
16 whether the taxpayer has a qualifying child and whether the taxpayer is a qualifying child of  
17 another taxpayer). *See* Declaration of James L. Canto II In Support Of Plaintiffs' Motion For  
18 Class Certification (hereinafter Canto Decl.), Exhibit A – 1994 Guam Forms 1040, 1040A,  
19 1040EZ; 1994 Schedule EIC; 1994 Form 1040 Instructions.

20 A taxpayer claims the EIC by filling out a specific section of the income tax return form  
21 designated for this purpose. *Id.* An additional form is required only if a “qualifying child” is  
22 also claimed. By filling out the EIC section of their tax return a taxpayer is attesting they meet  
23 all requirements to qualify for the credit. Abuse is deterred by imposing a penalty for false  
24 claims. Ineligible taxpayers who take the credit may not be allowed to take the credit for as  
25 long as ten years. *Id.* If a taxpayer does not want to compute the actual amount of credit due  
26

1 they can simply write "EIC" on that portion of their tax return and the Government of Guam  
2 will compute the credit owing for them. *Id.*

3 **B. The Government's Misconduct In Administration of the EIC in Guam<sup>1</sup>**

4 By law Guam's tax code mirrors certain provisions of the U.S. Internal Revenue Code,  
5 including those sections that create and define the Earned Income Credit. The EIC became  
6 effective in the U.S., and, therefore, in Guam, in 1975. The Government of Guam provided a  
7 mechanism for its citizens to make claims for the EIC and paid the credit due from 1975  
8 through 1994. In fact, it is estimated more than 9,400 Guam taxpayers received approximately  
9 \$11 million in EIC payments for tax year 1994.

10 On June 23, 1989, the Government, through its Attorney General's office (the "AG"),  
11 expressly acknowledged it is obligated to pay the EIC to eligible taxpayers in the same manner  
12 as ordinary tax refunds, *i.e.*, from the General Fund. *See* Canto Decl., Exhibit C -  
13 Memorandum Opinion No. DOA 89-0750 (the "1989 AG Opinion"). Six years later, however,  
14 the Director of the Department of Revenue and Taxation (the "DRT") unilaterally decided to  
15 terminate the EIC in Guam. In direct contradiction to the 1989 AG Opinion, DRT issued  
16 Revenue Ruling 96-001 (the "1996 Revenue Ruling") stating the EIC did not apply to Guam  
17 and, even if it did, DRT could not certify EICs due for payment because the Legislature had  
18 made no appropriation to fund the EIC. *Id.*, Ex. D - 1996 Revenue Ruling. On January 4,  
19 1996, Guam's AG at the time, issued Memorandum Opinion No. DRT/DOA 96-001 (the "1996  
20 AG Opinion") adopting DRT's misguided 1996 Revenue Ruling. *Id.*, Ex. E - 1996 AG  
21 Opinion.

22 As this Court recently noted:

23 . . . [T]he shift in policy was more attributable to a shortfall in  
24 the public coffers than one in legal reasoning. In DRT's Revenue  
25 Ruling No. 96-001, the director stated that "[a] definitive ruling  
by the Director of DRT is necessary at this time because

26 <sup>1</sup> The following facts have been admitted by Defendants in their Answer and accepted by the Court in its ruling on summary judgment. *See* Canto Decl., Ex. B - Summ.J Order entered June 15, 2005.

GovGuam has experienced large amounts of lost revenue and cash outlays under the EITC.'

Summ.J Order at 7.

As a result of the 1996 AG Opinion and Revenue Ruling, the 1995 and 1996 tax return forms published by the Government included the words "not applicable in Guam" over the section providing taxpayers a mechanism to claim the EIC. *See* Canto Decl., Ex. F – Guam Income Tax Return Forms for tax years 1995, 1996 & 1999-2003 (hereinafter "Guam Tax Forms"). Further, no specific form to claim the EIC was made available to taxpayers. The Government did not compute or pay any individual EICs for either tax year 1995 or 1996.

In response to the Executive Branch's unilateral reversal of tax policy, in 1997 the Legislative Branch of the Government passed several laws to implement the Guam Earned Income Program (the "Guam EIC") and to ensure continuous funding of the Program. *See* Public Law 23-74, 11 Guam Code Ann. §§ 42101 et seq. As such, the 1997 and 1998 income tax forms published by the Government included a mechanism for eligible taxpayers to specifically claim the EIC. The Government paid some, but not all, EICs for the 1997 tax year. The Government did not pay any EICs for the 1998 tax year.

The 1999-2003 income tax forms published by the Government once again included the words "Not Applicable" over the section providing the mechanism to claim the EIC. *See* Canto Decl., Ex. F – Guam Tax Forms. Once again the Government did not provide a supplemental form to make a specific claim for the EIC. Instead, despite the action of the Legislature in 1997, the Executive Branch once again refused to implement the EIC.

The Government did not change its conduct even though in 2001, the Supreme Court of Guam, at the request of the Legislative Branch, published an opinion stating the Organic Act required Guam taxpayers receive the benefits of the EIC and thus, DRT is obligated to pay the EIC to eligible Guam taxpayers.<sup>2</sup>

<sup>2</sup> *In Re Request of I Mina' Bente Sing'ko Na Liheslaturan Guahan Relative to the Application of the Earned Income Tax Credit Program to Guam Taxpayers ("the EIC question")*, 2001 Guam 3, 9 (S.Ct. Guam 2001) a copy of which is attached hereto as Exhibit G to the Canto Decl.



1 **C. The Income Tax Refund Reserve Fund and Tax Refund Efficient Payment Trust**  
2 **Fund**

3 In 1994 the I Liheslaturan Guahan [the Guam Legislature] mandated a portion of  
4 income tax receipts be reserved in a special fund "in order to accumulate sufficient cash  
5 reserves to pay projected income tax refunds, earned income tax credits and child tax credits in  
6 a timely manner." 11 Guam Code Ann. §§ 50103. *See also* Public Law 22-140:IV:2(b), the  
7 Income Tax Refund Reserve Fund Law (the Reserve Fund Law); 11 Guam Code Ann. §§  
8 50101 et seq. Under the Reserve Fund Law, the Director of Revenue and Taxation, in  
9 consultation with the Director of Administration and the Director of the Bureau of Budget and  
10 Management, is required every year to establish a formula, based on the statistical average of  
11 refunds and credits issued in the prior three years, to determine the portion of tax receipts to  
12 deposit in the Income Tax Refund Reserve Fund (the "Reserve Fund"). 11 GCA § 50103.

13 The Reserve Fund must be maintained in a separate bank account and cannot be  
14 commingled with any other government funds. 11 GCA § 50102. Expenditures can be made  
15 solely for payment of income tax refunds and specified credits. 11 GCA § 50105. The money  
16 placed in the Reserve Fund is not subject to any transfer authority of the I Maga'lāhen Guahan  
17 [the Governor of Guam] and cannot be pledged by the I Maga'lāhen Guahan. *Id.* *See also* 11  
18 GCA § 51106. Monthly reports to the Legislature on all expenditures from and deposits to the  
19 Reserve Fund must be made by the Director of Administration. 11 GCA § 50107.

20 In 2002 the I Liheslaturan Guahan, passed additional provisions which allow the portion  
21 of tax receipts designated for the Reserve Fund to be placed in an interest bearing Tax Efficient  
22 Payment Trust Fund (the Trust Fund) as they are collected on a monthly or quarterly basis. *See*  
23 11 GCA § 51101 et seq. When the Tax Commissioner is ready to pay tax refunds and credits,  
24 the tax receipts deposited in the Trust Fund must be transferred by the Director of  
25 Administration to the Reserve Fund. 11 GCA § 51102.

26 As with the Reserve Fund, monies in the Trust Fund must be maintained in a separate  
bank account and cannot be commingled with any other government funds, 11 GCA § 51101;

1 they are not subject to any transfer authority of the I Maga'lahren Guahan, 11 GCA § 51107;  
2 and cannot be pledged by the I Maga'lahren Guahan. 11 GCA § 51105. Within 15 days of  
3 every deposit made to the Trust Fund the Director of Administration and the Tax  
4 Commissioner must report to both the I Liheslaturan Guahan and the I Maga'lahren Guahan the  
5 amount of the deposit and the current balance of the Trust Fund. 11 GCA § 51106.

6 Unfortunately for Guam's taxpayers, tax receipts, have not been deposited into either the  
7 Reserve Fund or the Trust Fund pursuant to the formula prescribed in the Reserve Fund Law  
8 and/or the manner prescribed in 11 GCA § 51102. *See* Canto Decl., Ex. H – Correspondence  
9 from Department of Administration dated January 18 and 26, 2005 (hereinafter “DOA  
10 Letters”). *See also id.*, Ex. I – Correspondence from Department of Revenue & Taxation dated  
11 February 8, 2005 (hereinafter “DRT Letter”). Further, neither the Department of  
12 Administration or the Department of Revenue and Taxation have complied with the reporting  
13 requirements of 11 GCA § 50107 and § 51106. *Id.*

14 **D. The Plaintiff's Experience With the EIC<sup>3</sup>**

15 **1. Plaintiff Naputi**

16 Plaintiff Naputi has been a resident of Guam during all relevant tax years. For tax years  
17 2000, 2001, 2002 and 2004 she paid income taxes and timely filed tax returns with the  
18 Government of Guam. For tax year 2002 she filed as “married filing jointly,” she had one  
19 qualifying child, and in that tax year Ms. Naputi had a taxable income that qualified her for the  
20 EIC. For these four tax years she provided all information requested on the income tax return  
21 form relevant to her as a taxpayer.

22 Plaintiff Naputi estimates she qualifies for an EIC of \$1,394 in 2002 and an  
23 undetermined amount in 2004. She did not receive an EIC refund payment or offset against her  
24 taxes for any of the tax years at issue. She never received a formal notice of disallowance of her  
25

26 <sup>3</sup> Affidavits of each named Plaintiff submitted with Plaintiffs Reply Brief in Support of Plaintiffs' Motion for Partial Summary Judgment are attached hereto.



1 claims to an EIC, nor did she waive her right to such notice for any of the tax years at issue.  
2 Ms. Naputi expects she will qualify for an EIC in 2004.

3           2.       Plaintiff Simpao

4           Plaintiff Simpao has been a resident of Guam during all relevant tax years. For tax years  
5 1996 through 2004, she paid income taxes and timely filed tax returns with the Government of  
6 Guam. In 1996 she filed a tax return as a "single" taxpayer. She had one qualifying child. In  
7 1997 she filed as "married filing jointly" with one qualifying child; in 1998 as "married filing  
8 jointly" with two qualifying children; in 1999 as "married filing separately" with one qualifying  
9 child; in 2000 as "married filing separately" with one qualifying child, in 2001 "married filing  
10 separately" with two qualifying children; in 2002 as "head of household" with two qualifying  
11 children; and in 2003 as "head of household" with three qualifying children. In tax years 1996-  
12 1998 and 2002-2003 her taxable income qualify her for the EIC and she provided all  
13 information requested on the income tax return forms relevant to her as a taxpayer. Specifically,  
14 in tax years 1997 and 1998 she completed and filed the Guam Earned Income Program  
15 Application (GEIPA) provided by the Government.

16           Plaintiff Simpao estimates she qualified for an EIC of \$1,750 in 1996, \$837 in 1997,  
17 \$836 in 1998, \$3,128 in 2002, \$2,984 in 2003 and an undetermined amount in 2004. Ms.  
18 Simpao did not receive an EIC payment or offset against her taxes for any of those tax years.  
19 She never received a formal notice of disallowance of her claims to an EIC, nor did she waive  
20 her right to such notices for any of the tax years at issue. Ms. Simpao expects she will qualify  
21 for the EIC in 2004.

22           3.       Plaintiff Cruz

23           Plaintiff Cruz has been a resident of Guam during all relevant tax years. For tax years  
24 1995 through 2004, she paid income taxes and timely filed tax returns with the Government of  
25 Guam. For tax years 1996 through 2004, based upon income and filing status, she is eligible for  
26 the EIC refund. In 1996, 1997, 1998, 1999, 2000, 2001 and 2003 she filed a tax return as a

1 “head of household” taxpayer and she had one qualifying child. In 2002 she filed as “head of  
2 household” with two qualifying children. In tax years 1996-2004 her taxable income and  
3 taxpayer status qualify her for the EIC and she provided all information requested on the income  
4 tax return forms relevant to her as a taxpayer. Specifically, in tax years 1997 and 1998 she  
5 completed and filed the Guam Earned Income Program Application (GEIPA) provided by the  
6 Government.

7 Plaintiff Cruz estimates she qualified for an EIC of \$855 in 1996, \$908 in 1997, \$1,022  
8 in 1998, \$712 in 1999, \$789 in 2000, \$1,144 in 2001, \$2,644 in 2002, \$1,005 in 2003 and an  
9 undetermined amount in 2004. Ms. Cruz did not receive an EIC payment or offset against her  
10 taxes for any of those tax years. She never received a formal notice of disallowance of her  
11 claims to an EIC, nor did she waive her right to such notices for any of the tax years at issue.  
12 Ms. Cruz expects she will qualify for the EIC in 2004

#### 14 E. Procedural History of This Action and Related Actions

##### 15 1. Procedural History of This Action

16 This action was filed on December 3, 2004. Five weeks later, in direct response to  
17 Plaintiffs’ Complaint, the Governor of Guam issued Executive Order No. 2005-01 directing  
18 DRT to establish a process by which Guam’s taxpayers can submit claims for the EIC for tax  
19 years 1995–1996 and 1999–2004. *See* Canto Decl., Ex. J – Executive Order No. 2005-01,  
20 entered January 12, 2005 (hereinafter “2005 Executive Order”). The 2005 Executive Order  
21 however, made no commitment those claims would ever be processed or paid. *Id.* The  
22 Government never published any formal announcement through public media to give notice to  
23 taxpayers that a claims procedure was now available. Despite the lack of individual notice,  
24 over 15,000 claims have been filed, over one third of which are for 2004. *See* Canto Decl., Ex.  
25 K – Copy of Exhibit 5 to the Decl. of John Camacho Submitted in Support of Defendant’s  
26 Opp. To Plts.’ Mot. For Summ.J.

1 Plaintiffs filed a First Amended Complaint on February 1, 2005, adding an additional  
2 named Plaintiff and the claim regarding creation and administration of the Reserve and Trust  
3 Funds. On March 17, 2005, this Court denied in its entirety the Government's Motion to  
4 Dismiss the First Amended Complaint. The Government then answered the operative  
5 complaint on March 28, 2005. A Second Amended Complaint was filed April 18, 2005 adding  
6 a third named plaintiff.

7 On June 15, 2005 this Court granted Plaintiffs partial summary judgment holding:

8 Guam's taxpayers should not be made to pay for the financial  
9 woes of its sovereign. If Guam is unable to pay for the EIC, it  
10 alone, has the power to change its tax code by delinking from the  
11 IRC in accordance with the Tax Reform Act of 1986, or by  
enacting an additional tax to cover its expense. *See* 48 U.S.C.  
§1421i(a). Short of those options, *the Court finds as a matter of*  
*law, Guam must pay the EIC.*

12 Summ.J Order at 7-8. This Court also held:

13 This Court is concerned that the government took actions that  
14 discouraged if not actually affirmatively prohibited the filing of a  
15 return with the request for the EIC. *The Court therefore finds,*  
*under the circumstances, the filing of the tax returns should be*  
*considered a claim satisfying the jurisdiction requirement*  
*under 26 U.S.C. § 6511 [i.e., the provision prescribing time*  
*limits for filing an administrative claim].*

17 Summ.J. Order at 9. The Court noted the Government had implemented an Executive Order  
18 establishing a claims procedure for EIC claims as requested in Plaintiffs' Second Amended  
19 Complaint. In light of that fact, the Court declined to grant, on summary judgment motion, the  
20 injunctive and declaratory relief regarding provision of a claims procedure and payment of  
21 claims. Summ.J. Order at 11. The Court then directed:

22 *The plaintiffs are to take action to certify the class and proceed*  
23 *with this matter as a refund suit.*

24 Summ.J. Order at 13.

25 2. Related Cases

26 Two class actions similar to this case are also pending in this Court:

(1) *Santos v. Camacho*, Civil Docket No. 04-00006; and

1 (2) *Torres v. Government of Guam*, Civil Docket No. 04-00038.

2 There has been little activity in the *Torres* action. A motion to dismiss was briefed and heard  
3 but no order has issued. The Plaintiff in *Torres* has, however, asked its court to take judicial  
4 notice of this Court's denial of Defendant's Motion to Dismiss and entry of Partial Summary  
5 Judgment for Plaintiffs in the present case.

6 The *Santos* action was filed February 12, 2004 on behalf of a class consisting of persons  
7 denied EICs in tax years 1998-2003. It did not cover EIC claimants for tax years 1995-1997  
8 nor claimants for 2004 and future tax years. *See* Canto Decl., Ex. L – *Santos* Complaint.

9 Only four months after the Complaint was filed Magistrate Judge Manibusan signed a  
10 Stipulated Order Granting Preliminary Approval of Class Action Settlement. *See* Canto Decl.  
11 Ex. M. – Copy of *Santos* Stip. Order Granting Prelim. Approval of Class Action Settlement  
12 entered June 17, 2005 with Settlement Agreement attached (hereinafter First Settlement  
13 Agreement). A few days later Judge Manibusan signed an additional order awarding the  
14 *Santos* Plaintiff's counsel stipulated attorneys' fees and costs in the amount of 10% of the  
15 Settlement Amount (\$6 million dollars). No motion pursuant to Rule 26(a) had been filed. The  
16 fees were to be paid from, and not in addition to, the Settlement Amount. He also authorized  
17 class notice by publication only. *See* Canto Decl., Ex. O – *Santos* Order Granting Atty's Fees  
18 and Costs entered June 24, 2004).

19 The proposed settlement agreement was not signed by the Governor of Guam. Instead  
20 it was signed by the Attorney General; the Lieutenant Governor as "Acting Governor of Guam"  
21 (the Governor himself was off island); and the Directors of the Department of Revenue and  
22 Taxation the Department of Administration. *See* Canto Decl. Ex. M – First Settlement  
23 Agreement. Governor Camacho later sought to investigate the circumstances under which the  
24 settlement had been reached. He was told by the Attorney General: "there is no written  
25 documentation regarding the history of the negotiations leading up to the Settlement  
26 Agreement." *See* Canto Decl. Ex. N – Copy of Governor of Guam's Mem. Of P. & A. in

1 Supp. Of Opp. To Pet'r Mot. For Approval of the Administrative Settlement Plan at 5  
2 (hereinafter "Gov's Opp. To Settlement").

3 Under the proposed settlement the class was expanded to include 1996 (but not 1995 or  
4 1997 or 2004 and subsequent tax years) and class members would receive, at best, less than  
5 50% of EIC credits due (\$60,000,000 was offered to settle \$112,000,000 in estimated claims,  
6 exclusive of accrued interest). See Canto Decl., Ex. M – First Settlement Agreement.

7 In response to the proposed settlement Plaintiff Naputi in this action and Plaintiff Torres  
8 moved to intervene noting numerous substantive and procedural defects in the proposed  
9 settlement. Their motions were denied August 5, 2004. The Court found Plaintiffs Naputi and  
10 Torres could protect their interests by opting out of the settlement, filing objections or by filing  
11 a separate law suit. Thus, both Torres and Naputi here filed their own class actions.<sup>4</sup>

12 In an attempt to cure some of the defects in the settlement noted in the intervention  
13 briefing, Plaintiff's counsel in *Santos* asked for and received an Order appointing him interim  
14 class counsel. See Canto Decl., Ex. O – *Santos* Order entered July 16, 2004. He also filed a  
15 motion for approval of a purported "Administrative Plan" that was, in reality, a revised  
16 settlement agreement. See Canto Decl. Ex. P – Correspondence between the Office of the  
17 Governor and the Attorney General's Office dated September 16, 2004 referring to the  
18 Administrative Plan as "a new settlement under the guise of an administrative plan." The  
19 Attorney General filed a response to the motion, apparently over the objection of the Governor.

20 As a result, on November 9, 2004, the Governor of Guam sought to appear in the action  
21 with his own counsel for purposes of "stating his concerns" regarding the proposed settlement.  
22 The Governor contended the Attorney General did not adequately represent his office. As for  
23 the settlement, the Governor believed: (1) the settlement was illegal because it was contrary to  
24

25 <sup>4</sup> In addition, Plaintiffs filed a Notice of Appearance in the *Santos* action as class members to monitor its progress.  
26 The notice requested Plaintiffs be served copies of all pleadings and motions. Plaintiff Santos moved to strike the  
entry of appearance and has not served Plaintiffs copies of her filings. The issue was briefed in the *Santos* action  
but never acted on by the court.

1 Guam's Illegal Expenditures Act, 5 G.C.A. § 22401, prohibiting an officer of the Government  
2 from obligating the Government to pay money in advance of an appropriation made by the  
3 Legislature for such purpose; (2) the complaint was insufficient to establish jurisdiction  
4 because it did not allege exhaustion of administrative remedies; and (3) any approval of an  
5 "administrative plan" was improper unless and until final approval was given to the settlement.  
6 See Canto Decl., Ex. N – Gov's Opp. to Settlement. Additional defects noted by the Governor  
7 included:

- 8 • Numerous deficiencies in the notice;
- 9 • Attorney's fees had been resolved by stipulation as opposed to by motion and were  
10 disproportionately high (\$6 million) given Plaintiff's counsel had done nothing but file  
11 a complaint and negotiate a settlement in less than a day;
- 12 • A noticeable lack of adversarial proceedings prior to settlement including a complete  
13 lack of discovery regarding the value of the claims;
- 14 • Conflicts within the class between members whose claims were time barred and those  
15 whose were not;
- 16 • The settlement was substantively unfair given claimants would receive only 50% of the  
17 EICs due (if that); and
- 18 • Attorney's fees were guaranteed regardless of how many members opted out of the  
19 settlement.  
20  
21

22 See Canto Decl. Ex. N – Gov's Opp. to Settlement.<sup>5</sup>

23  
24 <sup>5</sup> In addition to the predictable disputes regarding such a suspect settlement, the *Santos* action has also  
25 been the scene of a battle between the Governor of Guam and the Attorney General over who speaks for Guam in  
26 the litigation. The Attorney General filed a motion to strike the appearance made by the Governor arguing he was  
the "Chief Legal Officer for the Government of Guam" and therefore had the right to control this litigation. Much  
briefing ensued in which the Attorney General sought to prohibit the Governor from appearing with his own  
counsel. In the end, Magistrate Judge Manibusan ruled, on February 9, 2005, the Governor had a right to be heard  
through his own counsel because the Organic Act provides: administration and enforcement of the GTIT shall be  
performed by or under the supervision of the Governor. But notably, two days later on February 11, 2005, it was



1 On March 11, 2005, before arguments regarding the settlement were heard, the parties  
2 asked the Court to hold the motions in abeyance while they pursued mediation. About this  
3 same time, Plaintiffs in this present action defeated the Attorney General's Motion to Dismiss.  
4 See Order entered March 17, 2005. Plaintiffs here asked the parties in *Santos* if they could join  
5 the mediation. See Canto Decl., Ex. P - Correspondence Re: Mediation. The request was  
6 denied. *Id.* Plaintiff's then asked the *Santos* court to allow and order their participation in the  
7 mediation. See Canto Decl., Ex. Q - Plts.' Mot. Re: Mediation. The Court declined to do so.  
8 *Id.*, Ex. R - Order Re: Mediation. As such, Plaintiffs here proceeded to move for summary  
9 judgment in this action.

10 On June 13, 2005 the day before the hearing on Plaintiffs' motion for summary  
11 judgment in this action, the Governor of Guam notified this Court the parties in the *Santos*  
12 action (with the notable exception of the Attorney General) had entered into a "term sheet."  
13 That did not deter this Court, who acknowledged as much, from hearing and granting Plaintiffs'  
14 summary judgment motion. A few days later, after this Court entered summary judgment for  
15 Plaintiffs, the parties to the *Santos* action (with the notable exception of the Attorney General)  
16 filed:

- 17 1. A Motion to Amend Class Action Petition (with the proposed amended  
18 petition);
- 19 2. A Motion for Conditional Certification Of The EIC Class for Settlement  
20 Purposes; and
- 21 3. A Joint Motion for Preliminary Approval of Settlement Agreement with a New  
22 Settlement Agreement attached. See Canto Decl., Ex. S.

23  
24  
25 the Attorney General, not the Governor who moved to dismiss this action. And together the AG's office and the  
26 Governor jointly participated in opposing the summary judgment motion.

1 Although the Governor has signed on to the settlement, this time it is the AG who has not. The  
2 AG publicly opposes the settlement.

3 Magistrate Judge Manibusan, who entered all orders in the *Santos* matter to date stated  
4 on June 27, 2005 he will not hear the motions. Rather, they will be heard by a visiting District  
5 Court Judge with Article III authority. Hearings on the motions are as yet unscheduled.

6 Whether the new settlement proposed in *Santos* should be given preliminary approval  
7 will be determined in a separate proceeding. Suffice it to say here, the new settlement cures few  
8 if any of the defects previously noted by the Governor and Plaintiffs. In particular, the Court  
9 still has no jurisdiction over the action as the requirement for exhaustion of administrative  
10 remedies cannot be waived. Notably two prior District Court judges have held this Court has  
11 jurisdiction over the matter solely because the issue of estoppel was adversarially litigated and  
12 decided. Further in the new *Santos* settlement the proposed class remains internally conflicted  
13 between time barred and non-time barred class members. And, most importantly, the new  
14 *Santos* settlement is grossly unfair and unreasonable in light of the results Plaintiffs have  
15 obtained here in the present action. Notably, claims for tax years 1995, 1996, 1999 and 2000  
16 are compromised for less than 25% their estimated worth in the settlement agreement.

17 The Governor of Guam now seeks to intervene and subsequently stay this action  
18 pending resolution of a futile motion for preliminary approval of the new but still defective  
19 settlement in *Santos*. The matter of the proposed intervention will also be briefed separately.  
20 For now Plaintiffs simply note Guam's poorest taxpayers should not be deprived of the  
21 victories secured in this action, in particular, the holding regarding exhaustion of administrative  
22 remedies. As such, Plaintiffs ask this Court to certify this action and its summary judgment  
23 holding for class treatment pursuant to Fed. R. Civ. P. 23(a) and (b)(2).

### 24 III. PROPOSED CLASS DEFINITIONS

25 To prosecute all claims brought in this action, Plaintiffs seek to certify three separate  
26 but related classes: a "Claims-Made Class," a "Refund Class," and a "Future Refund Class."



1 **A. The Claims-Made Class**

2 Claims One, Two, and Three of Plaintiffs' Second Amended Complaint are brought on  
3 behalf of the Claims-Made Class. The named Plaintiffs seeks to ensure all these class members  
4 have been or are afforded the opportunity to file a timely and allowable administrative claim  
5 for any EIC to which they were entitled in tax years 1995, 1996, and 1999-2003.<sup>6</sup> The  
6 Claims-Made Class is defined as:

7 All Guam income taxpayers who, for any or all of tax years 1995,  
8 1996, and 1999-2003: (1) meet threshold criteria to claim an  
9 EIC pursuant to the Organic Act and/or the Guam EIC; (2) filed a  
10 tax return; and (3) have not received a refund or an overpayment  
11 associated with their EIC claim, nor has such overpayment been  
12 applied to their tax liability. For purposes of this class definition  
13 "threshold criteria to claim an EIC" are: (1) an income level  
14 within the range of that specified for EIC eligibility pursuant to  
15 26 U.S.C. § 32; and (2) a filing status consistent with eligibility  
16 for the EIC pursuant to 26 U.S.C. § 32.

17 The Claims-Made Class includes a subclass consisting of Potentially Time Barred  
18 Claims. The subclass is defined as: all members of the Claims-Made Class who filed a tax  
19 return for tax years 1995, 1996 and/or 1999.<sup>7</sup>

20 Plaintiffs are the named representatives for this class. Plaintiffs Simpao and Cruz are  
21 the named representatives for the Potentially Time-Barred subclass.

22 The specific relief sought for the Claims-Made Class, as a whole, consists of either:  
23 (1) declaratory relief stating the tax returns they have already filed constitute timely and  
24 allowable claims for refund of the overpayment associated with their EICs, or are sufficient to  
25 allow amendment of such claims; or, alternatively, (2) injunctive relief requiring the  
26

<sup>6</sup> Tax years 1997 and 1998 are excluded from this class because, on information and belief, the Government of  
Guam provided an adequate EIC claims mechanism and procedure for those tax years. Should discovery indicate  
adequate claims procedures were not provided, Plaintiffs preserve their right to seek modification of the Class  
Definition to include taxpayers with claims based on their 1997 and 1998 tax returns in the Claims-Made Class.

<sup>7</sup> Tax year 2000 is not included because in the potentially Time Barred Claims Class the Santos action tolled the  
time period for filing an EIC claim as of February 12, 2004. Absent tolling, the limitations period for tax year  
2000 would have expired April 15, 2004. If tolling does not apply, taxpayers asserting claims for tax year 2000  
should be included in the Potentially Time Barred Subclass.

1 Government to provide notice to Class members of their entitlement to the EIC and a procedure  
2 and schedule under which such claims can be made.

3 The additional or alternative relief sought for the Potentially Time-Barred Subclass  
4 includes declaratory relief the Government is estopped from asserting the applicable statutory  
5 limitations period to bar Plaintiffs from filing claims now for refund of 1995, 1996, and 1999  
6 EIC overpayment. Such claims may be filed within a reasonable time as set by the Court.

7 **B. The Refund Class**

8 Claim Four is brought on behalf of the Refund Class. The Refund Class is defined as:

9 All Guam income taxpayers who, for any or all of tax years  
10 1995–2003, were: (1) eligible to receive the EIC pursuant to the  
11 Organic Act and/or the Guam EIC; (2) filed a timely and  
12 allowable administrative claim for refund of the overpayment of  
13 their EIC; and (3) have not received a refund of the overpayment  
14 nor has the overpayment been applied to offset their tax liability.  
For purposes of this class definition, a “timely and allowable  
administrative claim” includes claims filed pursuant to any relief  
granted any portion of the “Claims-Made Class,” as well as  
claims timely filed pursuant to applicable provisions of the tax  
code.

15 The relief sought for the Refund Class includes declaratory relief that the EIC applies to Guam  
16 taxpayers either through the Organic Act or pursuant to the Guam EIC and payment of the  
17 refund due based on the EIC claims. Plaintiffs Simpao, Naputi and Cruz are the named  
18 representatives for this Class.

19 **C. The Future Refund Class**

20 Claims Five and Six are brought on behalf of the Future Refund Class. This proposed  
21 Class includes:

22 All Guam citizens who, for any or all of tax year 2000 and any  
23 subsequent year in which the EIC remains authorized by law:  
24 (1) were or will be eligible to receive the EIC pursuant to either  
25 the Organic Act and/or the Guam EIC; (2) have not yet filed a tax  
26 return; (3) are still able to file a timely and allowable  
administrative claim, pursuant to 26 U.S.C. § 6511, for refund of  
an overpayment associated with an EIC to which they are  
entitled; and (4) have not received a refund of an overpayment  
associated with an EIC, nor has such an overpayment been  
applied to offset their tax liability.

1 The relief sought for the Future Refund Class includes declaratory relief that the EIC  
2 applies to Guam taxpayers either through the Organic Act or pursuant to the Guam EIC and  
3 injunctive relief requiring the Government to: (1) process and pay EIC claims in the time and  
4 manner required by law; and (2) establish and fund the Reserve Fund and Trust Funds  
5 mandated by the Legislature in 11 GCA § 50101 and § 51101. Plaintiffs Simpao, Naputi and  
6 Cruz are the named representatives for this Class.

7 Plaintiffs seek to certify this action on behalf of all proposed Classes as a mandatory  
8 class pursuant to Rule 23 (b)(1) and (2).

#### 9 IV. THE LAW SUPPORTS CERTIFICATION OF THIS ACTION FOR CLASS 10 TREATMENT

##### 11 A. The Principles Governing a Class Certification Determination

12 The decision whether to certify a class is left to the sound discretion of the Court.  
13 *Staton v. Boeing*, 327 F.3d 938, 953 (9<sup>th</sup> Cir. 2003). The Court's determination will be upheld if  
14 it appears from the record the Court considered all the criteria of Rule 23. *Local Joint Exec.*  
15 *Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1161 (9<sup>th</sup> Cir.  
16 2001) (reversing denial of class certification where trial court did not apply Rule 23 criteria).  
17 Courts favor a liberal interpretation of Rule 23, rather than a restrictive one. *Bower v. Bunker*  
18 *Hill Co.*, 114 F.R.D. 587, 592 (E.D. Wash. 1986) (a "liberal construction [is] intended for  
19 Rule 23"). "[I]f there is to be an error made, let it be in favor and not against the maintenance  
20 of the class action, for it is always subject to modification should later developments during the  
21 course of the trial so require." *Esplin v. Hirschi*, 402 F.2d 94, 99 (10<sup>th</sup> Cir. 1968); *see also*  
22 *Fed. R. Civ. P. 23(c)(1)* ("An order under this subsection may be conditional, and may be  
23 altered or amended before the decision on the merits.").

24 Application of the Rule 23 criteria is independent of any consideration of the merits of  
25 the complaint. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140 (1974). There is  
26 "nothing in either the language or the history of Rule 23 that gives a court any authority to  
conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be

1 maintained as a class action.” *Id* at 177. To the contrary, “a court is bound to take the  
2 substantive allegations of the complaint as true . . . .” *Blackie v. Barrack*, 524 F.2d 891, 901  
3 n.17 (9th Cir. 1975).

4 The issue on the instant motion, therefore, is not whether the Class will prevail on the  
5 remaining issues. Indeed Plaintiffs have already prevailed on the primary issues. Rather, the  
6 Court must decide whether this case raises common issues of law or fact, and whether unitary  
7 adjudication of these common issues is manageable and superior to the alternatives of  
8 piecemeal litigation or non-redress of claims. *See* Fed. R. Civ. P. 23

9 For the reasons set forth below, application of Rule 23’s requirements demonstrates  
10 certification of the Class proposed is both appropriate and necessary in this case.

11 **B. All Class Claims Meet Rule 23(a) Requirements for Class Treatment**

12 1. Rule 23(a) Requirements

13 There are four prerequisites to class certification under Fed. R. Civ. P. 23 (a):

14 One or more members of a class may sue or be sued as  
15 representative parties on behalf of all only if (1) the class is so  
16 numerous that joinder of all members is impracticable, (2) there  
17 are questions of law or fact common to the class, (3) the claims or  
18 defenses of the representative parties are typical of the claims or  
19 defenses of the class, and (4) the representative parties will fairly  
20 and adequately protect the interests of the class.

21 2. The Numerosity Requirement is Satisfied in This Action

22 Rule 23(a)(1) requires a class be sufficiently numerous to make joinder of all members  
23 impracticable. Notably, joinder is not required to be impossible — merely impracticable.  
24 *Smith v. University of Washington School of Law*, 2 F. Supp. 2d 1324, 1340 (W.D. Wash. 1998)  
25 citing *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913 (9th Cir. 1964). In  
26 addition to the expected number of Class members, other factors to consider include:  
“geographical dispersion, degree of sophistication, and class members’ reluctance to sue  
individually.” *Rodriguez v. Carlson*, 166 F.R.D. 465, 471 (E.D. Wash. 1996). *See also Jordan*

1 v. *Los Angeles*, 669 F.2d 1311, 1319 (9th Cir.1982), *vacated on other grounds*, 459 U.S. 810,  
2 103 S.Ct. 35, 74 L.Ed.2d 48 (1982).

3 Here, the numerosity requirement is easily met. Based on the number of EIC claims  
4 filed in 1994, Plaintiffs estimate the Class numbers in the thousands. Over 9,000 claims were  
5 filed in 1994. Further, over 15,000 claims have been filed in response to the Governor's recent  
6 Executive Order establishing a claims procedure. *See* Canto Decl., Ex. K. In addition,  
7 individuals comprising the putative Classes are likely to be reluctant or unable to bring their  
8 own actions since the majority of them, as shown by their qualification for the EIC, are most  
9 likely unable to front the fees necessary for representation. In addition, individual recoveries  
10 are relatively small ranging from \$2 to \$4,000, further decreasing the likelihood individual  
11 claims would be pursued.

12 3. Numerous Questions of Law and Fact Are Common to the Proposed Classes

13 Rule 23(a)(2) requires there be "questions of law or facts common to the class." The  
14 commonality requirement is liberally construed. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011,  
15 1019 (9th Cir. 1998). "The threshold for commonality is not high." *Mortimore v. Federal*  
16 *Deposit Ins. Corp.*, 197 F.R.D. 432, 436 (W.D. Wash. 2000) citing *Jenkins v. Raymark*  
17 *Industries, Inc.*, 782 F.2d 468, 472 (5th Cir.1986). It "is satisfied when a party has engaged in  
18 a standard course of conduct which adversely affects a group of individuals and gives rise to a  
19 claim for relief." *Bjustrom v. Trust One Management Corp.*, 199 F.R.D. 346, 348 (W.D. Wash.  
20 2001); *see also Mortimore*, 197 F.R.D. at 436 ("Plaintiff's allegations must arise from a  
21 common nucleus of operative fact, and the defendants must have engaged in a common course  
22 of conduct").

23 Here, each Class member's cause of action derives from a single course of conduct by  
24 the Government: its public announcement the EIC was no longer applicable in Guam; its  
25 printing of tax forms that blocked out sections designated to claim the EIC; and its refusal to  
26 process and pay claims made for EICs. Plaintiffs and Class members all seek the same relief:

1 an ability to submit claims for EICs and recovery of EICs owed them by the Government.  
2 Further, "[c]lass treatment is not precluded by the fact determination of the refund amount  
3 might require individualized assessment." *Appoloni v. U.S.*, 218 F.R.D. 556, 562 (W.D. Mich.  
4 2003) (certifying tax refund action for class treatment.) The application of the governing  
5 federal and Guam statutes to these claims is uniform. All claims in this case raise uniform  
6 issues of law. The common issues include but are not limited to the following:

- 7 1. Whether Guam taxpayers are entitled to notice now that they are entitled to  
8 claim the EIC on income tax returns for tax years 1995, 1996, and 1999-2003;
- 9 2. Whether the Government wrongly represented on published tax forms and  
10 through other means that the EIC was unavailable to Guam taxpayers in any or all of tax years  
11 1995, 1996, 1999-2003;
- 12 3. Whether the Government provided notice and a process for EIC claims  
13 sufficient to satisfy the basic requirements of Due Process for tax years 1995, 1996 and 1999-  
14 2003;
- 15 4. Whether the Government has waived any requirement that taxpayers who filed  
16 income tax returns for tax years 1995, 1996 and 1999-2003 are required to make a more  
17 sufficient claim for an EIC;
- 18 5. Whether Plaintiffs are entitled to declaratory relief;
- 19 6. Whether the Government acted in bad faith in 1996 when it terminated the EIC  
20 made applicable to Guam taxpayers through the Organic Act;
- 21 7. Whether the Government acted in bad faith in 1999 and all years subsequent  
22 when it refused to pay EIC claims and/or provide notice and a procedure to make EIC claims  
23 despite provisions of the Organic Act and the Guam EIC requiring it to do so;
- 24 8. Whether the EIC claims of the Potentially Time Barred subclass are, in fact,  
25 time barred, in light of the Government's conduct directed toward all subclass members;
- 26 9. Whether the Government's conduct has caused a serious injustice;



10. Whether payment of EIC claims will cause the public's interest to suffer undue damage;

11. Whether the Government has provided a clear and certain post-deprivation remedy by which Plaintiffs could have claimed their right to a refund of EIC overpayments to which they were entitled; and

12. Whether Plaintiffs who were denied a post-deprivation remedy have no alternative adequate remedy at law, thus entitling them to the injunctive relief.

The proposed class meets the commonality requirement.

4. The Claims of the Representative Plaintiffs Are Typical of the Claims of the Classes

Rule 23(a)(3) further requires "the claims and defenses of the representative parties are typical of the claims or defenses of the class." "The typicality requirement . . . is closely related to the commonality requirement . . . ." *Bjstrom*, 199 F.R.D. at 349. *See also General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364 (1982).

The . . . requirement is designed to assure that the named representative's interests are aligned with those of the class. Where there is such an alignment of interests, a named plaintiff who vigorously pursues his or her own interests will necessarily advance the interests of the class. . . .

The named plaintiff's claim will be typical of the class where there is a nexus between the injury suffered by the plaintiff and the injury suffered by the class. Thus, a named plaintiff's claim is typical if it stems from the same event, practice, or course of conduct that forms the basis of the class claims and is based upon the same legal or remedial theory.

*Jordan v. County of Los Angeles*, 669 F.2d 1311, 1321 (9th Cir.1982), judgment vacated on other grounds, 459 U.S. 810, 103 S.Ct. 35 (1982).

When it is alleged that the same unlawful conduct was directed at or affected both the named Plaintiff and the class sought to be represented, the typicality requirement is usually satisfied, irrespective of varying fact patterns which underlie individual claims. *Smith*, 2 F. Supp. 2d at 1342. [T]ypicality turns on the defendant's actions toward the Plaintiff class, not particularized defenses against individual class members.

1 *Id.* (citation omitted).

2 Each of the named Plaintiffs have claims typical of the Classes they represent. All have  
3 suffered from the Government's illegal conduct refusing to process and pay EIC claims  
4 rightfully due. The claims of Plaintiffs and Class members thus arise from the same course of  
5 conduct by Defendant, are based on the same legal theories, and seek the same relief. The  
6 typicality requirement is met.

7 5. The Named Plaintiffs and Their Counsel Will Fairly and Adequately Protect the  
8 Interests of the Classes

9 Adequate representation 'depends on the qualifications of counsel  
10 for the representatives, an absence of antagonism, a sharing of  
interests between representatives and absentees, and the  
unlikelihood that the suit is collusive.

11 *Molski v. Gleich*, 318 F.3d 937, 955 (9<sup>th</sup> Cir. 2003) citing *Crawford v. Honig*, 37 F.3d 485, 487  
12 (9<sup>th</sup> Cir. 1995) (amended opinion)

13 The representative Plaintiffs in this case seek to force Defendant to accept, process, and  
14 pay all taxpayers' proper claims for EICs as required by law. Thus, Plaintiffs' claims are  
15 coextensive with, and not antagonistic to, the claims asserted on behalf of the Classes. Any  
16 potential conflicts between Class members with time barred claims and those whose claims are  
17 not so barred have been largely eviscerated by the summary judgment holding in this present  
18 case that *all* Class members have exhausted administrative remedies. To the extent any such  
19 conflicts exist, however, Plaintiffs have addressed the issue through establishment of an  
20 appropriate subclass.

21 Plaintiffs are committed to vigorously prosecuting these actions on behalf of their  
22 respective Class members. In fact, Plaintiffs have demonstrated that commitment through their  
23 prior motion practice establishing Defendant's liability for these claims.

24 Plaintiffs have also retained experience class counsel highly experienced in certifying,  
25 litigating, trying, and settling statewide and nationwide class actions, including actions  
26 involving consumer fraud, unfair business practices, and defective products. Plaintiff's counsel



1 have been found by many state and federal courts to be able, fair, and experienced class  
2 advocates. *See* Declaration of Kim D. Stephens submitted in support of this motion. Class  
3 counsel have been court-appointed to represent plaintiff classes in numerous complex, multi-  
4 state and nationwide class actions.

5 In sum, the named Plaintiffs and Class counsel readily satisfy the requirements of  
6 Rule 23(a)(4).

7 **C. Certification of all Claims Under Rule 23(b)(1) and (2) is Appropriate**

8 1. Rule 23(b) identifies three alternative sets of criteria for class certification

9 Once the requirements of Rule 23(a) are satisfied, an action may be maintained as a  
10 class action under Rule 23(b) if it meets any one of the following criteria:

11 (1) the prosecution of separate actions by or against individual  
12 members of the class would create a risk of

13 (A) inconsistent or varying adjudications with respect to  
14 individual members of the class which would establish  
incompatible standards of conduct for the party opposing the  
class, or

15 (B) adjudications with respect to individual members of the class  
16 which would as a practical matter be dispositive of the interests  
of the other members not parties to the adjudications or  
substantially impair or impede their ability to protect their  
17 interests; or

18 (2) the party opposing the class has acted or refused to act on  
19 grounds generally applicable to the class, thereby making  
appropriate final injunctive relief or corresponding declaratory  
20 relief with respect to the class as a whole; or

21 (3) the court finds that the questions of law or fact common to the  
22 members of the class predominate over any questions affecting  
only individual members, and that a class action is superior to  
other available methods for the fair and efficient adjudication of  
23 the controversy. The matters pertinent to the findings include: (A)  
the interest of members of the class in individually controlling the  
prosecution or defense of separate actions; (B) the extent and  
24 nature of any litigation concerning the controversy already  
commenced by or against members of the class; (C) the  
25 desirability or undesirability of concentrating the litigation of the  
claims in the particular forum; (D) the difficulties likely to be  
26 encountered in the management of a class action.

1 Fed. R. Civ. P. 23 (b).

2 When a class is certified under Rule 23(b)(1) or (2) its members are not entitled to  
3 notice and an opportunity to opt out. *See* Rule 23(c)(2) (noting the requirement for notice and  
4 an opportunity to opt out is only mandatory for cases certified under Rule 23(b)(3)). Under the  
5 discretionary authority provided in Rule 23(d)(2), however, the Court has the discretion to  
6 require notice and the right to opt-out even for a (b)(1) or (b)(2) class. *See Molski v. Gleich*,  
7 318 F.3d at 947 (9<sup>th</sup> Cir. 2003) (noting same).

8 2. This action meets the definition of a Rule 23(b)(1) or (b)(2) class

9 Here, the criteria for certification under 23(b)(1) and (b)(2) are easily met. The primary  
10 and threshold relief Plaintiffs seek is declaratory and injunctive relief to declare their right to  
11 EICs, address issues of whether certain claims are time barred, establish a procedural  
12 mechanism to claim EICs, and to receive efficient refund of EICs found due. Thus, as required  
13 under Rule 23(b)(1) prosecution of separate actions could create a risk of inconsistent  
14 adjudications, *see* Rule 23(b)(1)(A). Specifically, separate actions could result in inconsistent  
15 adjudications regarding whether a given plaintiff's claims are time barred. Further, this action  
16 will "as a practical matter be dispositive of the interests of the other members not parties." Fed.  
17 R. Civ. P 23(b)(1)(B). It is dispositive of all class members' interest in establishing once and  
18 for all the EIC applies in Guam. In addition, this action has the characteristics of those  
19 generally recognized as suitable for certification under Rule 23(b)(1), *i.e.*, it challenges the  
20 conduct or practices of a defendant required by law to deal with all class members in the same  
21 way, the relief sought is a combination of injunctive and monetary relief, and other individual  
22 suits are reasonably expected to be filed. *See* Newberg on Class Actions, Vol. 2 at 26-33  
23 (discussing characteristics of practical candidates for certification under Rule 23(b)(1)(A)).

24 These claims also fit the certification category defined by Rule 23(b)(2). Defendants  
25 have "acted or refused to act on grounds generally applicable to the class, thereby making  
26 appropriate final injunctive relief or corresponding declaratory relief with respect to the class as

1 a whole . . . .” Fed. R. Civ. P. 23(b)(2). As noted above, the government conduct at issue here  
2 was uniformly applied to all class members and the declaratory and injunctive relief sought will  
3 be as well. Thus, the claims satisfy the 23(b)(2) criteria.

4 Courts have certified tax cases under 23(b)(2) in similar circumstances, where the bulk  
5 of relief sought is declaratory and injunctive in nature. The holding in *Nelson v. Regan*, 560  
6 F.Supp. 1101, 1105 (D.C. Conn. 1983) *aff’d* by 731 F.2d 105, 110 (2<sup>nd</sup> Cir. 1984) is instructive:

7 An action, such as this, seeking declaratory and injunctive relief  
8 against government officials is the archetype of one where class  
9 action designation is straightforward, but largely a formality.  
10 Rule 23(b)(2) authorizes maintenance of a class action when “the  
11 party opposing the class has acted or refused to act on grounds  
generally applicable to the class.” That is clearly the case here.  
This case may be maintained as a class action, extending to those  
who have had or will have their tax refunds intercepted and paid  
over to the State of Connecticut.

12 Plaintiffs here are similar, their tax credits have been “intercepted” and held hostage by the  
13 Government of Guam. *See also Sorenson v. Sec. of Treas.*, 752 F.2d 1433, 1440 (9th Cir.  
14 1985) *aff’d* by 475 U.S. 851, 106 S.Ct. 1600 (1986); *Oatman v. Dept. of Treasury-I.R.S.*, 34  
15 F.3d 787, 789 (9<sup>th</sup> Cir. 1994).

- 16 3. The fact that Claim Four also seeks money damages in the form of the actual  
17 refund of EICs does not preclude certification under 23(b)(2).

18 In the Ninth Circuit:

19 Class actions certified under Rule 23(b)(2) are not limited to  
20 actions requesting only injunctive or declaratory relief, but may  
include cases that also seek monetary damages.

21 *Molski v. Gleich*, 318 F.3d 937, 947 (9<sup>th</sup> Cir. 2003) quoting *Probe v. State Teachers’ Ret. Sys.*,  
22 780 F.2d 776, 780 (9<sup>th</sup> Cir. 1986). Where money damages are sought the appropriateness of  
23 certification pursuant to Rule 23(b)(2) depends on two factors: (1) whether money damages  
24 are the predominant form of relief sought by the Plaintiffs; and (2) whether “substantial money  
25 damages are involved.” *See id.* at 946-951 (discussing at length the criteria for (b)(2)  
26 certification where money damages are sought). There is no bright-line rule. Rather the

1 determination depends on examination of the specific facts and circumstances of each case. *Id.*  
2 at 950.

3 Here both tests are met. As delineated in their Complaint the relief sought by Plaintiffs  
4 in this action includes: a declaration the EIC applies in Guam; a declaration tax returns  
5 already filed are sufficient to exhaust administrative remedies for purposes of bringing an EIC  
6 tax refund action; an injunction requiring the Government to establish a mechanism whereby  
7 class members can submit claims for EICs and requiring the Government to process those  
8 claims; an injunction requiring the Government to establish and fund certain Reserve and Trust  
9 Funds as mandated by the Legislature specifically to ensure EICs and other tax refunds would  
10 be paid in a timely and efficient manner; and actual refund of EICs due. The requests for  
11 declaratory and injunctive relief predominate both in number and in substance as no monetary  
12 relief can be won absent the declaratory and injunctive relief sought.

13 In addition, this is not a case that involves "substantial" money damages. Although the  
14 value of any class member's EIC claim for any given tax year can range from \$2 to \$4,204,  
15 plaintiffs believe discovery will show the majority of claims are in the lower end of this range.

16 Additionally, circumstances in this case ensure class members' due process rights will  
17 be adequately protected despite certification of mandatory class. Specifically, class members  
18 will have direct input as to the amount of their recovery through their participation in the claims  
19 procedure secured by injunctive relief. In addition the amount of money damages due flows  
20 naturally and incidentally from the declaratory and injunctive relief sought. Indeed, their  
21 calculation is formulaic and governed by existing tax tables.

22 Further, if after all the facts are known, the Court has concerns that individual damage  
23 amounts are significant enough to warrant an opt out opportunity for individual class members,  
24 the Court can afford appropriate notice be given to the class and provide that opportunity. *See*  
25 *Molski*, 318 F.3d at 951 (noting due process concerns raised by (b)(2) certification of money  
26 claims can be addressed by giving class members the right to opt out).

1           4.     Alternatively, Claim Four Meets the Requirements for Certification Under  
2                 Rule 23(b)(3)

3           If the Court perceives Claim Four as primarily a claim for money damages requiring  
4           certification pursuant to Rule 23(b)(3), the court can bifurcate the claims and certify Claim  
5           Four as a (b)(3) class. Those criteria are easily met by the claim.

6                 a.     *Common Questions of Law and Fact Predominate Over Individual*  
7                         *Issues*

8           A court should grant 23(b)(3) class certification when the questions of law and fact  
9           common to all Class members predominate over questions affecting only individual members.  
10          Fed. R. Civ. P. 23(b)(3). The predominance inquiry tests “whether proposed classes are  
11          sufficiently cohesive to warrant adjudication by representation.” *Amchem Products, Inc. v.*  
12          *Windsor*, 521 U.S. 591, 594, 117 S.Ct. 2231 (1997). It focuses on the relationship between  
13          common and individual issues. “When common issues present a significant aspect of the case  
14          and they can be resolved for all members of the Class in a single adjudication, there is clear  
15          justification for handling the dispute on a representative rather than on an individual basis.”  
16          *Hanlon*, 150 F.3d at 1022 (citations and quotations omitted).

17          Here, the two main issues presented in this case (whether the EIC applies in Guam, and  
18          whether class members have collectively exhausted administrative remedies) are without  
19          question central to this case. Their favorable resolution through summary judgment is  
20          potentially dispositive of any subsequent individual trials. Thus, the predominance requirement  
21          is easily met.

22                 b.     *A Class Action is Superior to a Multiplicity of Litigations as a Means of*  
23                         *Fairly and Efficiently Adjudicating Class Members' Claims*

24          To justify certification under 23(b)(3) this Court must find a “class action is superior to  
25          other available methods for fair and efficient adjudication of the controversy.” “A class action  
26          may be superior if class litigation of common issues will reduce litigation costs and promote  
27          greater efficiency, or if no realistic alternative exists.” *Valentino v. Carter-Wallace, Inc.*, 97  
28          F.3d 1227, 1235 (9th Cir.1996). Thus, a court must “balance, in terms of fairness and

1 efficiency, the merits of a class action against those of 'alternative available methods' of  
2 adjudication." *Georgine v. Amchem Prods. Inc.*, 83 F.3d 610, 632 (3d Cir.1996). Factors the  
3 Court should consider in making this determination are prescribed by the Rule:

4           The matters pertinent to the findings include: (A) the interest of  
5 members of the class in individually controlling the prosecution  
6 or defense of separate actions; (B) the extent and nature of any  
7 litigation concerning the controversy already commenced by or  
8 against members of the class; (C) the desirability or  
undesirability of concentrating the litigation of the claims in the  
particular forum; (D) the difficulties likely to be encountered in  
the management of a class action.

9 Fed. R. Civ. P 23(b)(3).

10           Use of the class device here will conserve scarce judicial and government resources.  
11 The alternative is to require thousands of Guam taxpayers to seek their own counsel and  
12 individually litigate claims most of which are well under \$4,000. Under these circumstances,  
13 Class members simply do not have a strong interest in individually controlling the prosecution  
14 of a separate action. Notably, while few taxpayers filed suit while the Government wrongfully  
15 deprived them of their EICs, over 15,000 have submitted claims for refunds once the  
16 Government made a claims procedure available — relief that was sought in this action and  
17 arguably brought about by this action. Thus, while there is little question Guam's eligible  
18 taxpayers want their EICs, there is also little question they cannot afford to individually litigate  
19 their claims.

20           Further, Plaintiffs anticipate discovery will show not all Class members are on Guam.  
21 Many may have migrated off island such that adjudication of their claims would occur in a  
22 different forum with potentially different results. A class action is also appropriate if  
23 duplicative lawsuits with potentially inconsistent results can be avoided. *Mortimore*,  
24 197 F.R.D. at 438. Also, there is no difficulty anticipated in managing a class action where the  
25 issues are decided on summary judgment and determination of damages is formulaic.

26           Finally, the pendency of two other actions concerning this controversy (the *Santos* and  
the *Torres* actions) does not preclude certification here. No other action has, as yet, been




1 certified for class treatment. The proposed settlement in *Santos* is unlikely to gain court  
2 approval. And, unlike this action, no other action has obtained any relief or rulings that benefit  
3 the Class.

#### 4 V. CONCLUSION

5 This case meets all requirements of Rule 23 and is especially well suited for class  
6 treatment. For all the reasons stated herein, this Court should exercise its discretion to manage  
7 what could be tens of thousands of individual actions as a fair and efficient class action.  
8 Accordingly, Plaintiffs respectfully request the Court grant Plaintiff's Motion for Class  
9 Certification, designate the named Plaintiffs as Class representatives for their respective  
10 Classes and Subclasses, appoint Plaintiffs' counsel as Class counsel, and, if necessary, order  
11 notice be sent to Class members.

12  
13 DATED this 5th day of July, 2005.

14 VAN DE VELD SHIMIZU CANTO & FISHER

15  
16 By:   
17 James L. Canto II

18  
19 TOUSLEY BRAIN STEPHENS PLLC  
20 Kim D. Stephens, P.S., *Pro Hac Vice*  
21 Nancy A. Pacharzina, *Pro Hac Vice*  
22 700 Fifth Avenue, Suite 5600  
23 Seattle, Washington 98104-5056  
24 206.682.5600

25 Attorneys for Plaintiff  
26

## TABLE OF CASES AND AUTHORITIES

### CASES

|                                                                                                                                                                                                       |        |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| <u>Amchem Products, Inc. v. Windsor</u> ,<br>521 U.S. 591, 117 S.Ct. 2231 (1997)                                                                                                                      | 28     |
| <u>Appoloni v. United States</u> ,<br>218 F.R.D. 556 (W.D. Mich. 2003)                                                                                                                                | 21     |
| <u>Bjstrom v. Trust One Management Corp.</u> ,<br>199 F.R.D. 346 (W.D. Wash. 2001)                                                                                                                    | 20, 22 |
| <u>Blackie v. Barrack</u> ,<br>524 F.2d 891 (9 <sup>th</sup> Cir. 1975)                                                                                                                               | 19     |
| <u>Bower v. Bunker Hill</u> ,<br>114 F.R.D. 587 (E.D. Wash. 1986)                                                                                                                                     | 18     |
| <u>Crawford v. Honig</u> ,<br>37 F.3d 485 (9 <sup>th</sup> Cir. 1995)                                                                                                                                 | 23     |
| <u>Eisen v. Carlisle &amp; Jacquelin</u> ,<br>417 U.S. 156, 94 S.Ct. 2140 (1974)                                                                                                                      | 19     |
| <u>Esplin v. Hirschi</u> ,<br>402 F.2d 94 (10 <sup>th</sup> Cir. 1968)                                                                                                                                | 19     |
| <u>General Telephone Co. of Southwest v. Falcon</u> ,<br>457 U.S. 147, 102 S.Ct. 2364 (1982)                                                                                                          | 22     |
| <u>Georgine v. Amchem Products, Inc.</u> ,<br>83 F.3d 610 (3 <sup>rd</sup> Cir. 1996)                                                                                                                 | 29     |
| <u>Hanlon v. Chrysler Corp.</u> ,<br>150 F.3d 1011 (9 <sup>th</sup> Cir. 1998)                                                                                                                        | 20, 28 |
| <u>In re Request of I Mina' Bente Sing'ko Na Liheslaturan Guahan<br/>Relative to the Application of the Earned Income Tax Credit<br/>Program to Guam Taxpayers</u> ,<br>2001 Guam 3 (S.Ct. Guam 2001) | 6      |
| <u>Jenkins v. Raymark Industries, Inc.</u> ,<br>782 F.2d 468 (5 <sup>th</sup> Cir. 1986)                                                                                                              | 20     |



|                                                                                                                                                |   |   |   |   |                   |
|------------------------------------------------------------------------------------------------------------------------------------------------|---|---|---|---|-------------------|
| <u>Jordan v. Los Angeles,</u><br>669 F.2d 1311 (9 <sup>th</sup> Cir. 1982)                                                                     | . | . | . | . | 20, 22-23         |
| <u>Local Joint Exec. Bd. of Culinary/Bartender</u><br><u>Trust Fund v. Las Vegas Sands, Inc.,</u><br>244 F.3d 1152 (9 <sup>th</sup> Cir. 2001) | . | . | . | . | 18                |
| <u>Molski v. Gleich,</u><br>318 F.3d 937 (9 <sup>th</sup> Cir. 2003)                                                                           | . | . | . | . | 23, 25, 26-27, 28 |
| <u>Mortimore v. Federal Deposit Ins. Corp.,</u><br>197 F.R.D. 432 (W.D. Wash. 2000)                                                            | . | . | . | . | 20, 21, 30        |
| <u>Nelson v. Regan,</u><br>560 F. Supp. 1101 (D.C. Conn. 1983)                                                                                 | . | . | . | . | 26                |
| <u>Oatman v. Dept. of Treas.,</u><br>34 F.3d 787 (9 <sup>th</sup> Cir. 1994)                                                                   | . | . | . | . | 26                |
| <u>Probe v. State Teachers' Ret. Sys.,</u><br>780 F.2d 776 (9 <sup>th</sup> Cir. 1986)                                                         | . | . | . | . | 27                |
| <u>Rodriguez v. Carlson,</u><br>166 F.R.D. 465 (E.D. Wash. 1996)                                                                               | . | . | . | . | 20                |
| <u>Smith v. University of Washington</u><br><u>School of Law,</u><br>2 F. Supp. 2d 1324 (W.D. Wash. 1998)                                      | . | . | . | . | 20                |
| <u>Staton v. Boeing,</u><br>327 F.3d 938 (9 <sup>th</sup> Cir. 2003)                                                                           | . | . | . | . | 18                |
| <u>Sorenson v. Sec. of Treas.,</u><br>752 F.2d 1433 (9 <sup>th</sup> Cir. 1985)                                                                | . | . | . | . | 26                |
| <u>Valentino v. Carter-Wallace, Inc.,</u><br>97 F.3d 1227 (9 <sup>th</sup> Cir. 1996)                                                          | . | . | . | . | 29                |

## **STATUTES, REGULATIONS AND RULES**

|                             |   |   |   |   |        |
|-----------------------------|---|---|---|---|--------|
| Fed. R. Civ. P. Rule 23     | . | . | . | . | passim |
| Fed. R. Civ. P. Rule 23 (a) | . | . | . | . | 19     |

|                                   |   |   |   |   |   |   |        |
|-----------------------------------|---|---|---|---|---|---|--------|
| Fed. R. Civ. P. Rule 23 (b)       | . | . | . | . | . | . | 24-25  |
| Fed. R. Civ. P. Rule 23 (b)(1)(A) | . | . | . | . | . | . | 25     |
| Fed. R. Civ. P. Rule 23 (b)(1)(B) | . | . | . | . | . | . | 25     |
| Fed. R. Civ. P. Rule 23 (b)(2)    | . | . | . | . | . | . | 26     |
| Fed. R. Civ. P. Rule 23 (b)(3)    | . | . | . | . | . | . | 28, 29 |
| Fed. R. Civ. P. Rule 23 (c)(1)    | . | . | . | . | . | . | 19     |
| Fed. R. Civ. P. Rule 23 (c)(2)    | . | . | . | . | . | . | 25     |
| 11 Guam Code Annotated §42101     | . | . | . | . | . | . | 6      |
| 11 Guam Code Annotated §50101     | . | . | . | . | . | . | 7      |
| 11 Guam Code Annotated §50102     | . | . | . | . | . | . | 7      |
| 11 Guam Code Annotated §50103     | . | . | . | . | . | . | 7      |
| 11 Guam Code Annotated §50105     | . | . | . | . | . | . | 7      |
| 11 Guam Code Annotated §50106     | . | . | . | . | . | . | 7      |
| 11 Guam Code Annotated §50107     | . | . | . | . | . | . | 7      |
| 11 Guam Code Annotated §51101     | . | . | . | . | . | . | 7      |
| 11 Guam Code Annotated §51102     | . | . | . | . | . | . | 7      |
| 11 Guam Code Annotated §51105     | . | . | . | . | . | . | 8      |
| 11 Guam Code Annotated §51106     | . | . | . | . | . | . | 8      |
| 11 Guam Code Annotated §51107     | . | . | . | . | . | . | 8      |

### **OTHER AUTHORITIES**

|                                                                   |   |   |   |   |   |   |   |
|-------------------------------------------------------------------|---|---|---|---|---|---|---|
| Attorney General of Guam Memorandum<br>Opinion No. DOA 89-0750    | . | . | . | . | . | . | 5 |
| Attorney General of Guam Memorandum<br>Opinion No. DRT/DOA 96-001 | . | . | . | . | . | . | 5 |

|                                                                                      |           |            |
|--------------------------------------------------------------------------------------|-----------|------------|
| Department of Revenue and Taxation<br>Revenue Ruling 96-001                          | . . . . . | 5          |
| Governor of Guam Executive Order No. 2005-01                                         | . . . . . | 10         |
| Order, J. Martinez, District Court of Guam Civil<br>Case No. 04-00049, June 15, 2005 | . . . . . | 5-6, 10-11 |
| Newberg on Class Actions<br>Vol. 2 at 26-33                                          | . . . . . | 25-26      |

## CERTIFICATE OF SERVICE

I, JAMES L. CANTO II, certify that I caused a copy of the foregoing document here filed to be served on the following individuals or entities on July 5, 2005, via hand delivery at the following addresses:

Counsel for Defendant  
Douglas B. Moylan, Esq.  
Office of the Attorney General of Guam  
Pedro's Plaza  
247 West O'Brien Drive  
Hagatna, Guam 96910

Office of the Governor of Guam  
Governor's Complex  
East Marine Corps Drive  
Adelup, Guam 96910

Respectfully submitted this JULY 5, 2005

VAN DE VELD SHIMIZU CANTO & FISHER  
TOUSLEY BRAIN STEPHENS PLLC

  
\_\_\_\_\_  
James L. Canto II  
Attorneys for Plaintiffs

## CERTIFICATE OF SERVICE

I, CURTIS C. VAN DE VELD, certify that I caused a copy of the foregoing document here filed to be served on the following individuals or entities on August 25, 2006, via hand delivery at the following addresses:

Counsel for Petitioner  
Charmaine Torres  
Peter C. Perez, Esq.  
Lujan, Aguigui & Perez, LLP  
Pacific News Bldg., Ste. 300  
238 Archbishop Flores St.  
Hagatna, Guam 96910

Counsel for Respondent  
Felix P. Camacho  
Daniel M. Benjamin, Esq.  
Calvo & Clark, LLP  
655 S. Marine Corps Drive, Ste. 202  
Tamuning, Guam 96913

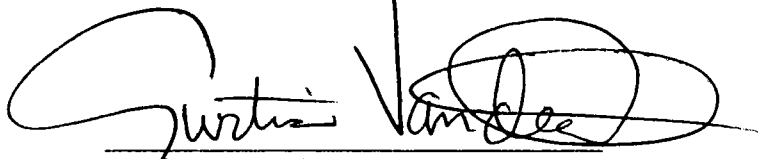
Counsel for Respondent  
Felix P. Camacho  
Shannon Taitano, Esq.  
Office of the Governor of Guam  
Governor's Complex  
East Marine Corps Drive  
Adelup, Guam 96910

Counsel for Respondents  
Artemio Ilagan and Lourdes Perez  
Rawlen M.T. Mantanona, Esq.  
Cabot Mantanona LLP  
BankPacific Building, 2<sup>nd</sup> Floor  
825 South Marine Corps Drive  
Tamuning, Guam 96913

Counsel for Petitioner  
Julie Babauta Santos  
Michael F. Phillips, Esq.  
Phillips & Bordallo, P.C.  
410 West O'Brien Drive  
Hagatna, Guam 96910

Respectfully submitted this 25 August 2006.

VAN DE VELD SHIMIZU CANTO & FISHER  
TOUSLEY BRAIN STEPHENS PLLC

A handwritten signature in black ink, appearing to read "Curtis C. Van de Veld", is written over a horizontal line.

Curtis C. Van de veld  
Attorneys for Plaintiffs